UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11 Case No. 20-11779 (LSS) (Jointly Administered)
VIVUS, INC., *et al.*,	.	
	.	Courtroom 2 824 Market Street Wilmington, Delaware 19801
Debtors.	.	
	.	Monday, August 31, 2020 2:30 p.m.

TRANSCRIPT OF TELEPHONIC/ZOOM HEARING
BEFORE THE HONORABLE LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY COURT

TELEPHONIC APPEARANCES:

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I N D E X

(Proceedings commenced at 2:30 p.m.)

THE COURT: Thank you. Good afternoon.

This is Judge Silverstein. We're here for the continued confirmation hearing in VIVUS, Inc., Case Number 20-11779.

Ginger, can you remind everybody of the protocol, please.

THE COURT RECORDER: It is extremely important that you put your phones on mute when you are not speaking. When speaking, please do not have your phone on speaker, as it creates feedback and background noise, and it makes it very difficult to hear you clearly. Also, it is very important that you state your name each and every time you speak for an accurate record.

Your cooperation in this matter is greatly appreciated. Thank you.

THE COURT: Thank you. Let me turn it over to debtors' counsel. I want to make sure we have, though, everyone we need. I see Mr. Manousiouthakis, I see Mr. Demmy, I see Mr. Makosky. I don't see yet Mr. Dijkstra.

Now, I do see you. Okay. Thank you.

That's it. I'll turn it over to Debtors' counsel.

MR. MORGAN: Thank you, Your Honor. Good afternoon. For the record, Gabe Morgan of Weil Gotshal on behalf of the Debtors. I'm joined by my partner Matt Barr and Jared

Friedmann, as well as counsel for Delaware Mr. Collins and Mr. Shapiro.

Your Honor, I just want to start by thanking you on behalf of the debtors, their board, management, employees, and each of our five witnesses for all of your time, your attention, and your careful thought throughout these cases and, in particular, the last week as we march through evidence and created a pretty impressively expensive record.

Your Honor, to assist in the discussion this afternoon, we prepared a presentation which we shared with your chambers as well as the objecting parties, so I'll ask my colleague Jake Schmidt to share his screen on Zoom so that we can see that as we work through it.

(Pause)

MR. MORGAN: All set?

As you know, Your Honor, we're here today for approval of the disclosure statement, final approval of the solicitation procedures, and confirmation of the debtors' pre-packaged plan. We filed our memorandum of law at Docket Number 185 on August 18, and that covers each of the requirements for approval of a disclosure statement and solicitation procedures, as well as confirmation of the plan. And it lays out in detail how the debtors satisfy each requirement.

Your Honor, one quick housekeeping item. When we filed our memo with the Court, we also submitted a motion for

permission to exceed the 60-page limit on briefing. As of this morning, I don't believe I saw an order approving that, so unless Your Honor has any questions on that motion, we respectfully ask that you authorize us to exceed the page limit before we proceed.

THE COURT: That's fine.

MR. MORGAN: Thank you, Your Honor.

Your Honor, these confirmation hearings come at the end of a long journey for the debtors. We did not rush into Chapter 11 but arrived here only once it became unmistakably clear that this company needs Chapter 11 to survive. It's important to dispel any misconception that we jumped to the conclusion of insolvency, as Dr. Ahmadi suggested on Wednesday, or that we failed to exercise due care in considering viable alternatives, as several have suggested throughout.

The record in this case makes clear, including extensive testimony by Mr. King, that over the past several years, and quite intensely in the past nine months or so before filing, the company sought various alternatives to address the looming May 2020 maturity of the convertible notes and avoid Chapter 11 all together. These efforts including without limitation repeated attempts to recapitalize the balance sheet through transactions involving debt, equity, debt and equity were all unsuccessful. But it started in 2018.

And if we jump, Jake, if we could jump to Slide 5 so we can move forward.

It started in 2018 with implementing a turnaround plan. By the fall of 2019, it was clear that plan would not on

its own be sufficient to repay the convertible notes, so the company as Your Honor well knows engaged Piper. Piper and the company evaluated debt, convertible debt, and equity alternatives. And Piper spoke to over a hundred potential investors. Unfortunately, those efforts did not lead to successful recapitalization.

As Ms. Stratton explained, the company received only two potential viable proposals for a senior/junior structure, and they were in the middle of negotiating terms with those two final parties when the COVID-19 outbreak, causing the junior lender to substantially reduce its proposed commitment due to its own capital called a status fund.

As Mr. King noted in his testimony, the company was speaking with IEH Biopharma, LLC, by far the largest holder of convertible notes, throughout this period and periodically before. And over an extended period of time, the company discussed an array of options with IEH to bridge the financing gap, including an extended payment schedule, full or partial equitization of their debt, and modifications to the equity structure. Unfortunately, none of these came to pass prior to maturity. And still looking -- in nearly April, still looking for solutions to the upcoming maturity, the company determined it would seek equity capital and on April 1 announced it had started that effort through a direct offering of the sale of common stock.

However, at that point, the company started to have productive conversations with IEH, and the company suspended its equity capital raise effort when it became clear that the

transaction with IEH could be a better path for maximizing value for all stakeholders, including notably the debtors' equityholders.

I want to take a moment to digress, Your Honor, to discuss the debtors' net operating loss carry forwards. They're an important asset, and preserving that asset is an important feature of the debtors' plan. But they've taken on a significant, possibly even disproportionately significant role in this course during these cases. We've noted many times that the NOLs are not separately transferrable apart from the business and are not easily monetized, especially in change of control scenarios like ours. It can, however, have meaningful value in a reorganization so long as the plan qualifies under 382(l)(5) of the Tax Code.

Because of the old (indiscernible) restrictions, few debtors are actually able to propose a Chapter 11 plan that qualifies. We happen to be one of the lucky few. And the fact that the company could in Chapter 11 preserve NOLs for the benefit of the reorganized company is not lost on us. It also is not lost on IEH as one of the most likely to be the fulcrum creditor.

Our ability to maintain the NOLs for the reorganized company was one of a number of drivers in negotiations between the company and IEH that ultimately led to the grace period at

the maturity of the convertible notes. It also led eventually by extension to the toggle RSA and ultimately the stockholder settlement under the plan, all of which are attempts by the company to fight for the value -- fight for value on behalf of junior stakeholders.

THE COURT: What evidence do I have --

MR. MORGAN: And one additional point --

THE COURT: What evidence do I have on the particular negotiation and the particularities of the NOLs to IEH?

MR. MORGAN: So with respect to negotiations, I can tell you I was involved in some of those --

THE COURT: No, I'm not asking for your involvement.

MR. MORGAN: -- at least between counsel.

THE COURT: I'm not asking for your involvement. I'm asking for the evidence that I have, the competent evidence that I have of the actual negotiation and how, since you brought it up in this context, the NOLs were thought of by both the debtor and by IEH?

MR. MORGAN: So, Your Honor, I can't speak to the latter. How IEH viewed the NOLs is not something that anyone that the debtors could call to testify would have knowledge to testify about. But Mr. King did speak extensively about the role of the NOL in negotiations, as did Mr. Pickering, both of whom --

THE COURT: And neither of them -- neither of them

was directly involved in the negotiation by their own testimony.

MR. MORGAN: That's correct, Your Honor. They were, however, aware of the negotiations, and they also understood the significance of the NOLs for our enterprise, as well as the ability to preserve the NOL in a restructuring in a Chapter 11. And it's something I actually was about to hit on that I think may address some of Your Honor's concern because I was anticipating that.

It's a clarification of terminology really, which is you heard, I think, people say that the plan preserves the NOL for the benefit of Icahn, and that's honestly somewhat misleading because the plan preserves the NOL for the benefit of the reorganized company, which will be owned by IEH upon emergence. So in a way it is indirectly for IEH, but -- and I want to be clear on this point -- the carryback of NOL is limited to the entity that generated the NOLs.

So the NOLs would only be carried back within reorganized VIVUS, not IEH or its affiliates. So the NOL's effectively entity-bound, and if VIVUS were merged or was combined with another entity in some way, which I believe was a suggestion from some folks I forget which day but earlier, only future income could be offset. Nothing could be carried back.

THE COURT: Okay.

MR. MORGAN: (Indiscernible) has a long history of

incurring taxable losses, which means that they also don't have the ability to carry back NOLs today. So really we're talking about future income, and that the effect of those tax savings on the future income stream have been captured through the discounted cash flow that was prepared by Piper. And that's in Your Honor's record, as well.

So the value -- when you think about the value of this enterprise, the NOL is accurately reflected in the valuation analysis that's before you because Ms. Stratton's testimony was that they not only applied the NOLs through the forecasted period, which may or may not be possible but they did, they also made a significant adjustment in the perpetuity growth assumptions. It's inverse to negative growth in perpetuity, but they made the negative growth significantly less by virtue of assuming that they would -- the reorganized company would be able to use the NOLs in perpetuity even though these NOLs wouldn't carry forward in perpetuity. They have a limited shelf life.

So the value in the DCF captures what the reorganized company could expect to gain from the benefit of its NOLs.

THE COURT: Ms. Stratton's testimony was clear on that point that she included the NOLs relative to the company in the cash flow analysis. That was her testimony. What she didn't consider, and no one considered and it may not be relevant, is whether the NOLs have a special significance to

IEH because it is -- will be under the plan the sole shareholder and, therefore, able in theory to take advantage of the NOLs in a way that others could not.

Is that something that I should consider in this analysis in the 1129 standard as a corollary to the absolute priority rule that a party is not allowed to be paid more than 100 percent or receive more than 100 percent of value?

MR. MORGAN: So I think it is fair to consider that, Your Honor. And I submit we have considered that, and this is how. The value of the NOL is the value to the reorganized enterprise to offset its future income. And that's the point of what I was just saying, which is that it's effectively entity-bound, right. It's not as though -- I think the phrase I heard people use during evidence was absorbed, that there was this notion that somehow this tax attribute is almost going to be absorbed into a mothership of Icahn and then just applied wherever. But that's not how NOLs work.

It's -- and that's what I was sort of trying to detail just a moment ago which is the NOLs that are at VIVUS which would be preserved under this plan will have to stay at VIVUS. And if there some subsequent merger or combination, if it's possible and I don't know if it's possible because we don't know the specifics of our counterparty, would still keep it trapped at VIVUS. And it would only be for future income at VIVUS. So the future benefit of the tax attribute to IEH is

its ability to realize tax savings in the future --

THE COURT: Yes.

MR. MORGAN: -- as the owner of VIVUS. And that's reflected in their DCF. So the value --

THE COURT: And you're saying --

MR. MORGAN: I'm sorry, Your Honor.

THE COURT: And you're saying there's nothing more. You're saying there's nothing more in terms of value of the NOLs than what's already been captured by Ms. Stratton, which I understand what she has testified to. That was clear. My question is is there no more value specifically to IEH. And I say that because Mr. King was also very clear on multiple occasions probably surprising me, quite frankly, with his testimony that the importance of the -- and I'm, obviously paraphrasing -- the importance of the NOLs to IEH was something that the debtor considered not only with respect to the plan but when it went out to solicit debt and equity investment. And he said it multiple times I have in my notes, and I'm sure it's reflected in the transcript.

MR. MORGAN: So two responses to that. The first are two cases, In re Cellular Information Systems, 171 B.R. 926, and the second is In re Myrant. That's 334 B.R. 800. And in both of those cases, the Court looks to and addresses specifically the use of how do you properly value an NOL. Even though it is going to the benefit of the reorganized entity,

how is it property captured in value and how does that work with respect to 1129.

How it works with respect to 1129 is if the NOL is captured in the future forecast and it shows that there is still insolvency, there is no greater benefit being conferred to any party here because there is no benefit being conferred to the reorganized enterprise. And so because -- again, because of this sort of entity bound forward future income restriction, it's confined within the enterprise.

The other point I wanted to address, Your Honor, was the role of the NOL in a negotiation. You know, it was obviously a consideration. I said earlier it wasn't lost on us and it wasn't lost on IEH as the sort of putative fulcrum that as we -- well, in April 1 when they did the direct offering, that offering brought the company up very close to the 50 percent change of control and, in so doing, jeopardized the NOL which was -- if you think about it, it has a value to the extent that we reorganize under an (l)(5) plan. But if we were just recapitalizing, if we were going to effectuate a change of control, we're going to materially significantly impair those assets.

So the purpose of being able to try and maintain the optionality of both maintaining the asset to try and negotiate with one party to see what we could obtain for junior stakeholders while also maintaining the ability to go out and

if we can do it to cover up the ball lose the NOL but completely recapitalize the balance sheet. So there was a balance, and that's what I believe Mr. King was attesting.

THE COURT: Okay. And I have no testimony about the actual negotiation and the mindset of the people who were negotiating for the debtors with respect to that issue, do I?

MR. MORGAN: Well, I think you had Mr. King's testimony.

THE COURT: He was not involved directly in the negotiation. And he was clear --

MR. MORGAN: He was supervising --

THE COURT: He was clear on what his role was with respect to being a board member versus management.

MR. MORGAN: That's right. But he also was clear that there were weekly calls between management, the board, and the advisors that were working on the transaction. There was regular communication and feedback, guidance, and involvement. So there wasn't -- it wasn't as though he was uninvolved or the board was uninvolved. I don't believe -- I don't know that Your Honor's suggesting that, but his familiarity is there and his knowledge is, I submit, sufficient.

THE COURT: Okay.

MR. MORGAN: I also, Your Honor, sort of ask what is the significance of the frame of mind of the party negotiating. And I think the key here is what is the value to the

enterprise, right, because ultimately at the end of the day, 1129(b) if there is value in excess of the claims and the company is not insolvent, then we're not fair and equitable if we're not providing the junior stakeholders their attributable share, right.

So the point, and I keep coming back to the DCF because the point of the DCF is it showed them an abstract sense. And they may have thought that it was a really key important part for them, and we may have thought that it was a really good point of leverage for us. It doesn't really matter at the end of the day. It comes down to what is the value for the reorganized entity, what does that mean in terms of the present value of the enterprise, and where does that stack up against the claims against the enterprise because we're trying to determine insolvency because we're trying to come back fair and equitable under 1129(b).

So the rest of the story here, Your Honor, and that useful digression I think is helpful because it hopefully clears up some misapprehension about the role of the NOL. The role of the NOL was it's a significant asset to the reorganized entity, and it's something that the company that was going to effectively own the reorganized entity wanted to make sure it didn't lose. It changes the value proposition.

If we had issued more shares in early April and had impaired the NOL, then when Ms. Stratton did her DCF, the

number would have been much lower, right, because she wouldn't have had all those NOLs to offset into the future and the assumptions would have changed and the DCF value would have dropped.

THE COURT: It could have been, but they also could have raised perhaps enough money to pay off the debt, so I don't know -- if they weren't constrained by the NOL. The desire to save the NOL because it was valuable to IEH.

MR. MORGAN: Well, no, Your Honor. See, that's the beauty of the toggle because what the toggle allowed us to do was to go out and actually blow up the NOL and recapitalize. But in order to do that, we had to satisfy our debt, and that's the key because we weren't able to. Looking for equity capital, looking for debt capital, we weren't able to raise 200 million in order to repay our debt. And so that's -- and that's why -- and I'm glad you asked that question then because I don't want there to be any belief that the NOL or preservation of the NOL somehow constrained or inhibited management or the board's pursuit of refinancing options. Refinancing was the primary goal. The NOL would be an afterthought. It's only in the reorganization context that it had any relevance.

THE COURT: I'll look at the evidence that I have on that.

MR. MORGAN: I mean -- and that's actually sort of

carries me through the rest because the rest of the story is then going through the toggle RSA, the key feature of which was allowing the company the ability to go and complete the equity and debt capital processes that it had started and that it was so hopeful would actually carry the day but ultimately did not come to fruition.

And, also, Your Honor, I think the -- sort of at least in my mind -- a general thrust behind the narrative is the record is clear that these cases and the plan are the product of extended good-faith efforts by the company. And that's ultimately, I think, an important place to start.

So talking about the plan very quickly, Your Honor, just on a high level, pays all administrative expense and priority claims in full, rolls the secured notes into new debt under the existing facility but that existing facility -- I'm sorry, that existing facility, excuse me, also provides approximately 33 million of new capital, which is going to fund plan distributions and provide the company with net working capital. There is notably inescapably full equitization of the convertible notes and 200 percent of the reorganized equity.

There's also payment in full of all general unsecured creditors in full in cash which gives them a hundred percent recovery at the same time that under our valuation the convertible notes are getting 76 percent recovery. And then, finally, and I'm sure we will discuss this more later, there is

the existing stock settlement, Your Honor, which offers equityholders as of the record date an opportunity to participate in a settlement and receive a recovery even though as a matter of the absolute priority rule under 1129(b) they would not be entitled to a recovery.

But, Your Honor, we're here today, as I said, truly in need of reorganization and with a plan that we've demonstrated meets all the requirements for confirmation which gives us a clear line of sight to emergence as a going concern. But before we address how the debtors have met their burden, I just want to take a quick status check on the objections. There have not been any objections filed to the disclosure statement or the solicitation procedures.

We did note the August 5 letter of Mr. Roland Hughes, which asserted in large part that the existing stock settlement did not provide sufficient notice which we took as an objection to the settlement itself rather than solicitation. So I think we'll address that in that context. There are also the four objections from the stockholders, all of which drive primarily towards this 1129(b) valuation issue. The objection the U.S. Trustee which relates to, among other things, releases and existing stock settlement. We made changes to the plan. There's an amended plan on file. A lot of those are in discussion with the U.S. Trustee. We've been able to resolve a good number of the issues. We still have (indiscernible)

issues with the U.S. Trustee, so we will have to address those.

And then, finally, Your Honor, there were two contract counterparties (indiscernible) included in the confirmation order so those objections are not moving forward at this time.

And I don't want to repeat my brief.

THE COURT: Mr. Morgan?

MR. MORGAN: Yes, Your Honor?

THE COURT: Mr. Morgan, you're breaking up some here. Is it just me on my end, but --

MR. MORGAN: Is that better, Your Honor?

THE COURT: No. It's not better. You were good until about a minute ago.

MR. MORGAN: (Indiscernible). Is that better, Your Honor?

THE COURT: Yes.

MR. MORGAN: Okay. (Indiscernible).

THE COURT: Well, no, I'm lying. No.

MR. MORGAN: Is that better? Can you hear me now?

THE COURT: No.

Operator, can you check Mr. Morgan's line and see if we're having any interference, please?

THE COURT RECORDER: Your Honor, unfortunately, Mr. Morgan's line is connected and live, obviously, but there isn't really anything beyond that. It doesn't sound to me -- it

sounds to me like a phone issue. Whether he's on a handset or a cell phone, I don't know. But it sounds more like a cell phone in a wrong location.

MR. MORGAN: No, I'm on a landline, but I have a headset on. I don't know if folks can hear me better now.

THE COURT RECORDER: That sounds better.

MR. MORGAN: Is that better?

THE COURT: Yeah, let's try.

MR. MORGAN: Okay. I apologize, Your Honor. Where did you lose me? Was it the part where I was saying I don't want to repeat myself?

THE COURT: I'm not sure, actually, but we got through where the objections are and --

MR. MORGAN: Okay. And what I was saying, Your Honor, is actually literally I don't want to repeat what's in our brief or uncontested and uncontroversial. And time is (indiscernible) here, and I want to make sure we focus on what we see is the three major areas of contention today. First is valuation. And I know (indiscernible).

THE COURT: Okay. We're having trouble again.

MR. MORGAN: Let me try that again and I'll go off the headset. Is that better?

THE COURT: We'll see.

MR. MORGAN: Okay. And, again, I'm very sorry.

THE COURT: Okay.

MR. MORGAN: Okay. So valuation, taking those in turn, valuation, existing settlement -- existing stock settlement, and then releases.

Your Honor, the plan is built on a fundamental and unfortunate premise. The debtors are insolvent and that means to us, right, the value of the company as a going concern is less than the sum of all of the claims against it. And as Your Honor knows, our burden here is to demonstrate that fact by a preponderance of the evidence, which is to show that it's more likely than not the debtors are insolvent.

So to meet that burden, we've relied on the valuation analysis prepared by the debtors' investment banker, Piper Sandler, which was prepared in accordance to generally-accepted methodologies and assumptions. During the evidence portion of this hearing, Your Honor heard many of the testimony, cross-examination, the written declarations of Terry Stratton from Piper Sandler, Ben Pickering from Ernst & Young, and Thomas King, former CEO of VIVUS and a current board member.

In light of the evidence, including notably the testimony of Ms. Stratton as an acknowledged expert in corporate valuation, and thanks to the detailed work that she and her team performed in preparing a valuation analysis that is in line with generally-accepted methodologies and based on reasonable professional judgment and assumptions, we believe the record before the Court today demonstrates the debtors are

insolvent.

Ms. Stratton testified that she reached this conclusion not only on the basis of three valuation methodologies that form the bedrock of any credible enterprise valuation, comparable company analysis, discounted cash flow analysis, precedent transaction analysis, but also after considering the outcome of the debtors' recent market testing and the recapitalization effort and the sum of the parts analysis that aggregates market prices for the debtors' assets to derive an enterprise value.

Ms. Stratton testified that Piper Sandler's formal valuation analysis included the comparable company analysis and looked at reported financial data of 16 comparable public companies to determine an appropriate trading mold and estimated that the debtors' enterprise value was between 200 to 200.4 million, discounted cash flow analysis that determined the net present value of the forecasted revenues for the next three years, together with a terminal value that captures the debtors' profits for future earnings and prospective operational performance under which they estimated the debtors' enterprise value to be between 202 and 257 million.

And precedent transaction analysis that looked at 27 precedent transactions to determine their appropriate acquisition multiple and estimated the debtors' enterprise value to be between 220 and 249 million.

Ms. Stratton also testified that Piper made an informed judgment concerning the relevant significance of each of these methods and weighted each equally, so a third, a third, a third, to establish an estimated total enterprise value range between 210 million, 243 million, and 225. Although Ms. Stratton also testified that she believed as an expert in this area that the debtors' actual enterprise value was quite likely to be less than that because of the debtors' market test. And the valuation analysis doesn't formally incorporate the outcome the debtors' recapitalization efforts or the sum of the parts analysis, but they did consider those validated results.

And I want to focus there on the market test, in particular, because we talked a lot about the pre-petition efforts and the debtors' attempt to go and raise money to pay back and navigate the maturity, pay back the convertible notes and navigate the maturity. Those efforts failed. But one thing they did do was establish a market-informed data point on the debtors' enterprise value. And here's how they did that.

So the debtors were looking to raise a hundred million in debt and a hundred million in equity. And that hundred million in equity was for 9 percent stake in the pro forma ownership of the company, so I've applied the value to that equity of 110 million, granted I think for 9 percent of a company for 100 million, the company's worth 110 million. You

add those two together, you get 211. You take 14 of cash out, and you get 197. And that's the 197 number that we repeat in our papers frequently because that's the enterprise value at which the debtors attempted and failed to raise capital before commencing these cases.

And Ms. Stratton testified that in her experience as an investment banker and a valuation expert, the result of a market test and recapitalization effort were frequently determinative. But let's also not forget that the process failed, which means that the market didn't actually transact for 197. The true market value was likely somewhere below that because there were willing buyers and sellers at that 197 level.

And this is really important, Your Honor, and that we've been taking time to stress it, is that you heard a lot of objections to particular judgments, particular metrics, particular mean versus median, the right WAC, you heard a lot of attempts to just (indiscernible) disprove but at least to find some hole to poke in the thoughtful, methodical, consistent work that Piper Sandler prepared. But what you haven't heard is anything pointing to a different way to interpret the 197. And the 197 is a very sensible, practical, common-sense balance counterpoint to the more formal valuation work that Piper Sandler prepared.

So I think it's key to always sort of have in the

back of the mind that there is the valuation work and then there's also the corroboration of the debtors' efforts to go out and raise money. And all of these, Your Honor, it bears saying all of these are below the 270-million claim threshold, which also hasn't been contested. That's the threshold as of the effective date -- or the estimated threshold as of the effective date. And all of these fall well below it.

So, Your Honor, I think that that point, you know, sort of walk through the Piper analysis, walk through the market tests. And, unfortunately, the outcome of both of those is insolvency, but you also heard from other parties that they have a different view, that the company is actually worth more, much more. So I think we should turn and talk about the specific issues people have raised on that front.

And I think that starts us really with VI-0106. So what is it? VI-0106 is, as Your Honor heard, proprietary formulation of the drug tacrolimus, the product candidate being studied for the treatment of pulmonary arterial hypertension. Debtors acquired it in 2017 or I should say they acquired the rights to develop it, together with another product (indiscernible), both for an up-front fee of $1 million and a promise to make additional payments up to 9 million in the aggregate on hitting certain development milestones and then up to 30 million in the aggregate on hitting certain sales milestones.

But to date, the debtors have not reached any of the development milestones that would trigger a payment. To date, the debtors have spent whatever time and energy they've spent on VI-0106 working to come up with a stable formulation that would be worth testing. As far as the phases and studies, even though they had the product for several years, the debtors have only done a Phase I safety study on 19 subjects. That may or may not be applicable depending on the ultimate formulation.

To take a Phase I -- I'm sorry, to take it past Phase I, the debtors will need to submit an IND, an investigational new drug application, with the FDA and the FDA would have to accept it. The debtors have stated that it's their intent to do that the second half of this year, but as Mr. King testified, there's still significant uncertainty around whether or not to submit that with the current formulation because, as Mr. King explained, it may be scientifically viable but it's not commercially viable.

Let's put all this history and current status aside and let's just assume away all of that and say the formulation comes together quickly, debtors file the IND, it's accepted, then what? Mr. King and Ms. Stratton explained in their testimony that VI-0106 still has a long and very uncertain path to profitability, that if it performs no Phase II clinical trials for VI-0106. And, most importantly, they have no efficacy data which is the key to advancing a formal product.

As Mr. King testified, it's highly unlikely the debtors could obtain such efficacy data any sooner than 24 months from next Monday. And that assumes that they either started really, and there's no reason to assume that based on the facts on the record. There's no --

THE COURT: What facts on the record do I have? What facts in the record, competent evidence, do I have on management's plans for what they're doing with this -- with VI-0106?

MR. MORGAN: So Mr. King testified that they have -- that they do not have the -- and Ms. Stratton, too -- that they do not have the funds to develop it --

THE COURT: Ms. Stratton --

MR. MORGAN: -- that they do not have --

THE COURT: Ms. Stratton's testimony, how is that competent evidence on what management's going to do with this drug?

MR. MORGAN: I'll take Mr. King then. Ms. Stratton's testimony would be based on conversations with management, which she's not management.

THE COURT: Which is hearsay.

MR. MORGAN: Right. She's not management. But Ms. Stratton's testimony is also relevant because it is taken into account in the valuation, right. So there --

THE COURT: But that's different.

MR. MORGAN: -- her view which is --

THE COURT: She can rely on that for her valuation. But where's the competent evidence in the record from management about the timeline? Now I think we do have some evidence in the management presentations about the timelines. But what competent evidence do I have from management as to the timeline and the investment for this drug?

MR. MORGAN: From management? There wasn't a --

THE COURT: From management.

MR. MORGAN: There wasn't a management witness, but there is testimony from Mr. King and it is baked into the projection. So there is -- you do have the ability to see those -- that information based on the record.

THE COURT: And what evidence do I have of the projection, management's view of the projection?

MR. MORGAN: So maybe we should jump ahead. I was intending to talk about the projection. And maybe, Your Honor, we should jump ahead because I think you're referencing the June 2020 presentation.

THE COURT: There's several things, yes. There's several things that management has said about this drug and when it intended to do what, a timeline. And, also, revenues but a timeline. So I'm trying to see where in the record do I have from management the timeline on this drug.

MR. MORGAN: Well, Your Honor, a couple of things.

One, Mr. King's testimony is there is no clear timeline, and part of it is because they don't have a formulation that they're prepared to go forward with. And I also -- I understand you keep asking about management, but Mr. King is a board member. The board is supervising the process and running the company, and he's competent and understands both the timeline and the company's current status of development.

So I think his competency to speak to this is there, and he did in terms of talking about the sort of anticipated timeline, you know, if he were to assume that everything were to go, you know, like tomorrow, how long would it take, he said 24 months earliest. And even at that, you have no guarantee that that's going to be a productive 24 months, right, that you're actually going to get positive efficacy data at the end of the 24 months.

You also have stated from Mr. King about the lack of partnership --

THE COURT: The lack of what?

MR. MORGAN: The lack of being able to find a partner who would take on the drug and then invest the money they need. And then we have on the screen, Your Honor, an excerpt from the transcript which is sort of telling on this point exactly, that we were unable to find a partner at almost any price who would take the drug on and would be willing to investigate the 20 million we needed. So there's an added component of you're

saying, you know, how do I know the timeline.

Well, Mr. King was I thought clear there is no timeline because we don't know even when the starting gun had fired. But from when you start the starting gun, it's going to be at least 24 months until we see if we have efficacy data. And then if we have positive efficacy data, it may go to a point that actually this is starting to be something worthwhile. But there's also no guarantee or even real certainty that you're going to get positive efficacy data because sort of the second part of the two blocks of text that we have on the screen, it's all very much a hypothetical that this would even work.

THE COURT: Well, that's a different question. That's a different issue. That's a different issue as to whether there's enough certainty to value anything or whether it's all speculative. I understand that issue, as well. But I'm sort of starting with the basics. This management, at least in its presentations, talked about when it was going to file an IND. It wasn't backing off of this drug because it wasn't abandoning it. It was moving forward with it.

And how does I guess then -- maybe I'm wrong on that and you can tell me where I'm wrong, but how does Mr. King's testimony jive with what management was saying about what they were going to do with the drug?

MR. MORGAN: So, yeah. So the harmony here is that

management -- you have to remember the company is out looking for financing and it believed that there could be some -- again, it's a hypothetical. It's a dream, right. It's a great dream, but it's just a dream. But it's also one that they'll never achieve if they don't get money. So they have to be able to try and find people that will share their dream and the vision with them in order to actually fund it to get into a place where it could even possible have any kind of efficacy data that would indicate that it's anything other than a dream. But we're still at the dream --

THE COURT: Is that in the presentation somewhere? Where is that other than what Mr. King said? Where is that reflected in the SEC statements or the presentations that management was making? Where is "we have to find a partner?"

MR. MORGAN: So the -- let me pull up -- the 10-Q, the latest 10-Q that was filed in May, identifies no fewer than 12 different risk factors specifically with respect to VI-0106.

THE COURT: Yeah. There's probably risk factors.

MR. MORGAN: Well, they're identified specifically for the development and, right, the -- and I'm trying to pull it up for Your Honor so I can read from it.

THE COURT: And I guess I should ask is that in the record, because I don't want to look at things that are not in the record. So that's my mistake if I -- I know we have some things in the record.

MR. MORGAN: Well, I would submit that you could take judicial notice of an SEC filing, Your Honor.

THE COURT: For what, the truth?

MR. MORGAN: Well, you asked statements from management, you know, a statement by the company as to what risks there are out there.

THE COURT: And I should take that for the truth of what's asserted?

MR. MORGAN: No, Your Honor.

THE COURT: Or that it was said?

MR. MORGAN: That it was said.

THE COURT: Okay. I don't know. Our record's closed, but okay.

MR. MORGAN: And I'm trying to -- I apologize. I wish I had this up sooner. You also do have testimony from the advisors who were embedded with the company, from Mr. Pickering and from Ms. Stratton who had been working with the company to try and raise money -- and this is another point in VI-0106 -- trying to raise money and recapitalize the balance sheet based around whatever protected value there may be to this asset, right. And remember, that process did not result in a value greater than 197.

So parties that were being asked to invest equity, and I think equity is important, right, because potentially participating in the upside, we're not willing to transact at

that price -- invest in that price is maybe a better term or phrase.

(Audio skip from 48:20 to 48:49, music playing)

MR. MORGAN: -- Ms. Stratton also in terms of the cost, you know, puts the cost of development around potentially seven years in terms of getting it out to the market, also puts the cost around 40 to 60 million dollars.

THE COURT: And where do they get those numbers?

MR. MORGAN: From -- so Ms. Stratton got the number from, I believe, her team. And Mr. Pickering had the number from his experience, although again he was not being offered as an expert in the market.

THE COURT: Right. And aren't both of those numbers different from what Mr. King said, 20 million? So --

MR. MORGAN: He did. And I believe --

THE COURT: -- where did these numbers come from?

MR. MORGAN: So the 20 million, I believe, is a sort of what it would take to get this one study as opposed to what it would take to develop it through the rest of the process.

THE COURT: Okay. Well, are these facts? Are these -- they're coming through -- one's coming through an expert, okay. And I don't know if this is a fact that can come through an expert or not. Maybe it can. I haven't thought about that. But Mr. Pickering's not being offered as an expert, and he's not a debtor person. So is he just -- is his -- what he's

reciting just hearsay?

MR. MORGAN: It's based on his knowledge. It's based on his knowledge as someone who operates in this space. We did not put him up as an expert.

THE COURT: So he knows from his knowledge that it will take 40 to 60 million dollars to develop VI-0106? How does he know that?

MR. MORGAN: So I can go back to his declaration and his testimony, but he has extensive experience working in pharma companies. He's been CRO of pharma companies. He's been CFO of pharma companies. He's been involved in this kind of product development.

THE COURT: So is he talking generally or is he talking about this drug and --

MR. MORGAN: It was his view -- if you look at the record, Your Honor, it was his view of this drug. But I think King is the -- if you're looking for sort of the source of the party that is the closest to it that is not an advisor but is actually a board member of the company, I think Mr. King's testimony is the one that provides Your Honor that clarity.

THE COURT: Yeah, except I have three different numbers now from three different debtor witnesses. Okay.

MR. MORGAN: So, Your Honor, just to finish the line of thought on the uncertainty because it's building to the other point that you raised which is, you know, how to think

about discounting effectively. Sitting with an unfinished formulation and the Phase I safety data, we've got years at least, we've got significant outlay of cash, we've got no guarantee of efficacy. We have no even real certainty of efficacy or it's a hypothetical that -- right.

And then you take -- let's again say you jump through each hurdle, right, the decision tree, you make it down that branch, then you get to how long until it gets out into the market. And then once it's out in the market, what do they go through out there as well repeating the same thing. And there's no certainty around the product's ability to be competitive even if it is ultimately approved.

There are -- and this is Ms. Stratton's testimony, there are right now at least a dozen other products for the treatment of pulmonary arterial hypertension in the market and at least a dozen more in various stages of development, and many of those are expected to come to market before VI-0106.

THE COURT: Well, they might, yes.

MR. MORGAN: Right. Although several of those, Your Honor, actually you have efficacy data unlike us. So there are drugs out there with actual efficacy data.

THE COURT: Do we know -- okay. A lot of speculation there. Do we know if the other companies that own them have money that are developing them? What do we know, and who is giving us that information? But that's fine. There's no

question Ms. Stratton was very clear at least in this time as to why she said she places zero value, maybe a million, zero value on this drug. She's clear on that, although I think her testimony did somewhat change over time. But now I understand what her position is.

MR. MORGAN: Okay. I was about to go into that. I may just short-circuit some of that if Your Honor's comfortable with it. I think what it boils down to is really the difference between an income-based valuation methodology and an asset-based valuation methodology. An income-based, she's saying, look, there's so much uncertainty. It hasn't hit an inflection point. I can't get to a place where I can even give you a discount factor that I think accurately reasonably reflects risk. And so for that purpose, I'm guessing. If I give you anything other than zero, I'm guessing and I don't guess. I'm an expert in valuation.

That's not to say speculative investors won't guess, and that's also not to say that a company may not have a hypothetical and say it's worth some money for me to guess. There could be a reason for a company to say I'll give you a million dollars, and that's then the corollary, which is the asset-based view of value where in a market, you know, it's not someone will give you some level of cash.

But I think the best data point for that is what the company actually paid. The company actually paid a million

dollars. It's been three years since they paid a million dollars. They haven't moved it out of formulation stage. And, again, there's no efficacy data, so there's no reason to believe that anything has changed between 2017 and 2020 as it relate to this drug. So the million dollars is kind of the high watermark of where I think that asset value goes.

In either event, it's de minimis and ultimately doesn't move the needle to jump from solvent to insolvent. And that's where there's a case I want to bring Your Honor's attention to, a Seventh Circuit case called Xonics Photochemical, 841 F.2d 198. But the Seventh Circuit case, it was actually looking at contingent liability, but in arguably dicta, it also addressed the concept of you can't put a contingent liability at full face just like you can't take a contingent asset and say you put it at zero.

But what they do say, and I just want to read from the decision: "Occasionally one finds the flat statement that 'contingent or inchoate claims of the bankrupt are not included as part of the bankrupt's property.'" -- skipping over the citation -- "This is the equally untenable opposite extreme from valuing them at their face amount. But the quoted language appears to be loose; what these cases actually mean is that if, but for a contingent claim unlikely to yield any cash in the near future, the firm would be deemed insolvent, the existence of a faint hope — cold comfort for creditors waiting to be paid

— will not save it from bankruptcy."

And that's -- I'm looking for the pen cite.

(Pause)

MR. MORGAN: I apologize. I can't find the pen cite. It looks like 200.

THE COURT: Okay. And it's 841 F.2d?

MR. MORGAN: That's right.

THE COURT: Okay.

MR. MORGAN: And, again, it's a case looking at contingent liability and sort of the case of trying to understand, you know, how do you account for contingent liability like a guarantee. And in the case, they would say it's worth 100, and they were saying, well, you can't give that 100 just like you can't give an asset zero. But, also, there are assets that are so faint and so remote that they're effectively zero, which is really, Your Honor, where we come out whether you're under an income approach or you're on an asset approach. The answer is it's not very much. It hasn't hit the value inflection point.

THE COURT: And exactly when, remind me, did Ms. Stratton say it would hit the inflection point? Because management certainly had a track for this as well as their revenue thoughts. And Ms. Stratton rejected their revenue thoughts. I don't know if they were in the projections or not because as given by management because she applied her

judgment. But they also had a timeline or somewhat of a timeline on the development of this asset.

And I don't know because I haven't been able to line it up whether Ms. Stratton or her group rejected the timeline as well.

MR. MORGAN: So I -- the timeline, I think the issue with the timeline, Your Honor, is that the timeline is itself contingent. It is --

THE COURT: No. The timeline's not contingent. If management has a timeline, the timeline isn't contingent. It's their timeline for development.

MR. MORGAN: No. If they're aspirational timeline, Your Honor. That's the issue, right. There's no funding to continue this thing into the multi-million dollar cost of development or really on formulation. They did a very inexpensive safety study. But --

THE COURT: Well, where do I have that evidence? Where's that evidence other than people saying it? Ms. Stratton saying it. Where's that evidence? Because management --

MR. MORGAN: (Indiscernible).

THE COURT: Because management said in January what it was going to do, and it said in June what it was going to do, notwithstanding the fact that it was facing the maturity of the bond. But yet, it still said here's what we're doing. So

--

MR. MORGAN: Sure. And, again, Your Honor, those are operations of a company that can get the funding to continue doing what it would like to do. But that's part of the shortfall here is there isn't an ability to move forward with something. There also isn't any -- (indiscernible) into two issues, right. There's does it work, is there any reason to believe it works. There's a massive contingency around that, right, the lack of efficacy data. And that, I believe, is the inflection point for Ms. Stratton.

When you get efficacy data, then you see, oh, it works. It's worth something. It may come before that if you're starting to get positive indications or if you're sort of on track to get some kind of efficacy data, but from Piper and Stratton's view, efficacy is really the key.

On the timeline piece, I think what Your Honor is saying, you know, look, they wanted to drive it forward and that's all good and well, but you can only drive it forward if you have the means to do so. And you can only drive it forward once you get the formulation in place, which they don't have, and then once you have the funds, means, the funds to do so.

THE COURT: Well, when they de-lever, when the company's de-levered, are you saying they won't have the funds when the company's de-levered?

MR. MORGAN: There is nothing -- there is -- so there

is nothing in the exit facility that marks value for development of this drug.

THE COURT: Okay. I'm not sure why I know that because I'm not sure I had direct testimony on that. But let's assume that's true. Isn't there something in the record that says that the company -- I don't know if it said it was cash flow positive, but that it was positive if it didn't have to deal with the debt? I guess --

MR. MORGAN: It was -- yeah.

THE COURT: Again, I'm looking for the evidence.

MR. MORGAN: Uh-huh. But maintaining a steady state -- and I believe Your Honor is referencing comments that were made in connection with cash collateral -- maintaining a steady state isn't the same as having a significant amount of capital to invest in development.

THE COURT: Okay. So they were making statements at a time when they had no money and I should discount those statements, is what you're telling me?

MR. MORGAN: I think you have to take those statements for what they are, and that may be something good to -- a good pivot to talk about, in particular, the June 2020 presentation, and what it is and what it's not, right.

THE COURT: Okay.

MR. MORGAN: And so I think what you've gotten, Your Honor, is sort of a hand-picked comment from that presentation,

it doesn't represent the whole story because they don't -- one, there's other -- of course, you have to read the presentation as a whole, and two, you have to read it in the context of the comments of the public disclosures. And so when you look at it, the presentation itself has forward looking statement disclaimers, including specifically with respect to VI-0106 and just reading from it, right.

The disclaimer (indiscernible) notes that there are forward looking statements and says there are "subject to risks, uncertainties, and other factors, including risks and uncertainties related to our ability to execute on our business strategy to enhance long-term stockholder value and risks and uncertainties related to our ability to successfully develop or acquire a proprietary formulation of (indiscernible)." This is from June. It goes on to say the reader is cautioned not to rely on these forward looking statements.

And then when you actually look at the language on VI-0106, what it says in June is we believe the gross revenue potential is up to 750 million or more. Up to 750 million or more, that means it literally could be any number. It's clearly sort of a qualified aspirational goal of where this thing could potentially go some day if funded and if the formulation's correct, but it's not where we are and that's really the point, Your Honor, just to sort of bring it back because we're going to go onto 1129(b) context.

We're trying to understand what the value of the company today and trying to think about this asset, you know, is there any reason to put anything other than a de minimus amount of value on it given that -- of an asset based and on an income based approach, there's really good testimony from an expert that they don't. And then you also have -- I'll circle back to it and probably not the last time I'll do that while we're talking -- the market test that parties were asked, do you want to buy 90 percent of this company for $100 million? And by the way, you'll own VI-0106 at the end of that. And they all said no.

So indulge me for a moment while I look through my notes and make sure I hit everything. I think the other -- I think that's it on VI-0106, Your Honor.

The other significant assets, which are not in question -- the other significant asset is the NOL. We talked about this at the outset. I don't know that we need to retread the ground. But again, just to sort of summarize, the valuation reflects the NOL by applying the tax savings over the course of perpetuity not on just the life of the NOL but over the course of perpetuity and therefore, when you look at the valuation method, the DPF valuation method specifically, when you look at the valuation analysis, it gives you the data you need to understand. What is the NOL worth to the reorganized entity, and that is less than $271 million. And that really,

Your Honor, is the point. That even with the NOL, the company is still insolvent, which is why (indiscernible) 29(b) standard.

Your Honor, Dr. Ahmadi had a couple points on the NOL. I don't want to necessarily take up too much time talking about them. I think it suffices to say that we don't think it was properly calculated. We think the assumptions behind the calculation of the NOL in Dr. Ahmadi's letter were properly calculated, but also, I don't want to revisit that because I know Mr. Friedmann may have an oral motion to strike and you've taken it under advisement so I want to come back to reargue that today.

And then, I think that leads us to two more sort of subjects, Your Honor, and one which is (indiscernible) on the projection, and particularly, the presentation. I think there's been some suggestion that the optimistic statements in the June 2020 presentation were, you know, undermined the projection. And again, you know, we talked about it in the context of VI-0106, but the same applies for all of the statements. You have to look at this in context, right.

You have to understand there's a forward-looking statement disclaimer. You have to understand the SEC filings include numerous risk factors for each of these drugs, as well as the company and its operations above all. You have to understand the SEC filings are also giving parties, you know,

an indication of past performance of these products as well. And because our position here is that the full information environment at the time of the presentation would lead a reasonable person to understand these are goals, these are possibilities, this is not necessarily the stuff of financial forecast.

THE COURT: But, again, I guess my question is, where's my testimony from management that says here's why we said what we said in the June presentation or the January time frame or any other time frame, and here's why we rejected our projections down. Here's why our projections are different than that.

MR. MORGAN: You have the testimony of Ms. Stratton on that front, Your Honor.

THE COURT: She's not -- she is not -- she can rely on those projections, but she can't tell me why they're different from what management said and why management thinks what it said in June was for a different purpose and what -- I had a witness in my just previous valuation case blue sky thinking and whatever. But where's my management witness who tells me why the projections, which then Ms. Stratton relied upon, are correct and should be adjusted downward and should not include the aspirational thinking or statements that you say are in the June 2020 presentation?

How do I get beyond that? And I'd like to know how

do I get beyond that?

MR. MORGAN: Your Honor, you have the testimony of Mr. Pickering who was in bed with the company and understands, performed a liquidation analysis, and understands the products and their potential. You also have Ms. Stratton and the Piper team who were part of the creation and the formulation and then subsequent revisions to the projection, which is in the record.

And so you have both of -- you have Ms. Stratton explaining that she draws the distinction between optimistic outlook and reasonable financial projection based on empirical data and reasonable assumption. She had a hand in creating the projections and then also a hand in reshaping them over time as the company got more feedback and got new risks, got more information, got feedback from its recapitalization effort. And then you also have Mr. Pickering sort of doing a second look and gut check, I'll call it, where he's actually looked at it and said, you know, he thinks it's aggressive, optimistic, right. That 75 percent of the revenue growth assumptions in the projections are attributable to new and as yet unproven marketing channels, right. So that's -- I believe Mr. Pickering's words were, you know, that they're aggressive but it's achievable.

THE COURT: Okay.

MR. MORGAN: And ultimately it does loop back into Ms. Stratton's judgment as to whether or not these were

reasonable and reliable, you know, reasonable to rely upon for the purposes of her valuation, right. And so there is actually a connection back to the valuing -- have the corroboration of the FA, as well, but you have the valuation expert saying that they were part of putting these together, they were part of developing these, they believe they're reasonable, and they believe these are, you know, optimistic but achievable.

And then just a few more points on value, Your Honor, and these are sort of in direct response to some criticisms that were made during the course of cross-examination. There are a number of points, and I need to comment before I, you know, start trying to poke holes at various judgments or determinations that were made by Ms. Stratton and the Piper team. For example, you know, how do you compute your WAC, I used the last 12 months and why use median versus mean in the comparable transaction or comparable company analysis. I think the issue here is two-fold.

Take median and mean in the second because there were actually cases on this. But, in general, all of these raise questions. All of these look to try and sort of point a valuation another way. But none of these have any supporting evidence or any supporting counter-factual as to why something else would be better from another valuation expert. And even if they did, Your Honor, that doesn't mean we didn't meet our burden. And so even if there was another valuation expert,

it's not the case that we would have conflicting valuation experts, the debtors can't meet their burden. But here we don't even have differing conflicting valuation experts.

And again, you know, I'll beat the dead horse. But again, no one has had any response to the market test. No one has been able to explain why it is that we went out and weren't able to raise capital.

THE COURT: But that's not what Ms. Stratton's testimony is based on. It is based on the three methodologies, and this company was not marketed for sale nor was VI-0106 marketed for sale. So we have some market testimony to the extent that courts look to that, and that varies across the cases that I read. But neither the company itself nor the, in particular, VI-0106 was marketed.

MR. MORGAN: But also --

THE COURT: Or am I wrong?

MR. MORGAN: No. No. There was Stratton testimony, right, that she did receive some unsolicited offers on various other drugs. There was no offer on all of the company and the judgment was that piecemeal sale of assets would lead to, there is an enterprise. There is a benefit to a going concern here. And so recapitalization through financing what its preferable means for preserving value overall. And while there has been some unsolicited offers for drugs, there have been no unsolicited offers for VI-0106.

THE COURT: Okay.

MR. MORGAN: And then, two points that I want to raise. They're not really related to value, but I just want to sort of clean up the record a little.

One, Mr. Makosky raised on Friday sort of the notion -- there's two things that I just want very quickly to address. One, the notion that the board is somehow conflicted and has affiliations with Icahn, and the other is that, you know, sort of questioning the judgment or at least trying to get a clean answer on the secured note payment in 2019. Just to take those two in turn quickly.

So FEC disclosures and the testimony from Mr. King, all members of the board are independent other than John Amos and that's because he's the CEO, and that's been confirmed by a third-party assessment agency, Institutional Shareholder Services as recently as May 2019. They identified -- at that point, they identified two, John and another director not because of a connection to Icahn to be clear, but who stepped down in October 2019. So as of this entire period that we've been -- well, that we've been talking about, the pre-debt rate, equity rate period, as well, but the ISS reports and the disclosures to the SEC consistently show that there is no conflict.

Mr. Makosky sort of suggested, inferred from the fact that there was a proxy fight in 2013 and that some of our

current directors were appointed during that proxy fight, that therefore, they are conflicted. Proxy fight didn't include Icahn. It was commenced by First Manhattan Company, FMC, and it was also joined by Sarissa Capital. Now, Sarissa Capital was founded by an Icahn alum, but he left Icahn two years before the proxy fight and was participating as the principal and founder of Sarissa. So there's no conflict here. There's nothing -- it's all public record. Everything that I'm providing Your Honor is also available publicly. There's just no there there.

And then the other, the theory of payment. What happened there, and I think this was clear from the testimony but just to sort of bring it all together, we disclosed in the, or the company disclosed in the 10-Q from June 30, 2019, the company was not in compliance with a covenant in its secured note indenture for the minimum Pancreaze revenue. Again, you know, publicly disclosing that we're not hitting minimum revenue covenants in our secured debt documents is another part of the information environment for understanding what the reasonable assumption of redemption, or of possible gross revenues.

So the company received a waiver from Ethereum with respect to the potential of default, the result of that covenant breach and agreed at that time that it would continue to negotiate the terms of (indiscernible) venture. And as part

of that, needed to make a payment. They were going to pay it out as part of the ability to avoid having a default at that point, which if that debt had defaulted then, we would have been in front of Your Honor much sooner. So the payment was an effort to try and negotiate our way through that default, negotiate an amendment, move forward.

Again, all public record with, you know, 10-K, 8-K, so this is all out there and knowable, Your Honor. And so, with that, unless Your Honor has further questions, I think that that's what we wanted to talk about on the value point.

THE COURT: I think I've hit you with enough questions.

MR. MORGAN: I'm sure you can come up with more, so we could go for a while.

So moving on to 1129(b), I think that pivots us actually pretty cleanly into the existing stock settlement. And again, the existing -- the point from which to evaluate the existing stock settlement is the debtors enterprise value, right. The record before the Court we have argued demonstrates that the debtor's enterprise value is such that they are insolvent and therefore holders of interest are not entitled to receive any recovery under the plan pursuant to the absolute priority rule.

The plan recognizes that fact in 4(7)(b) where it specifies the treatment for interest, saying that they'll be

cancelled and all holders of interest shall receive no distribution on account of such interest. But -- and we stress this throughout these cases and this hearing -- the debtor's board and management negotiated and fought hard for a recovery to junior stakeholders, both the general unsecured and the shareholders, and that took a form of the existing stock settlement in the plan, which we think is notable because it provides that opportunity for recovery. And that's why in 4(7)(b), there's also a proviso after saying shares will be cancelled and receive no distribution, it says that holders of existing stock as of the existing stock record date may participate in the existing stock settlement if eligible on the terms and conditions described in 5(3) of the plan. 5(3) in the plan then provides that if the stockholder satisfies certain conditions in facilitating confirmation of a consensual plan and a fresh start, then they will receive their pro rata share of five million in cash and a contingent value right on a first share basis.

And the contingent value right if the reorganized debtor meet predetermined EBITDAR milestones in '21 and '22 provide a two dollar per share boost. So, Your Honor, the debtors -- well, actually, let me skip. Notably, Your Honor, we've engaged in constructive dialogue with the U.S. Trustee since the petition date and we agreed to make various amendments to the plan (indiscernible) and the plan settlement,

in general.

First, we removed all references to settlement throughout the plan if there wasn't some clear agreement between the debtors and the third parties. Changes intended to address the U.S. Trustee's stated concerns that the debtors attempt to impose the settlement standards of 9019 on all claims in interest.

Second, we removed the condition for participation in the existing stock settlement to avoid excluding those who sought to form or serve on an equity committee and we filed a notice of the change on August 3 which was served on all stockholders well in advance to the plan objection deadline on August 10th and the deadline to opt out of the releases on August 17th.

And then finally, Your Honor, we amended the releases that were, that would be granted by stockholders that participate in the settlement to ensure that they do not release claims for malfeasance or criminal acts. So in its objection, the U.S. Trustee has taken the position that settlement claims in interest against the debtor under the Chapter 11 plan are not subject to 9019 but instead must meet the fair and equitable standard under 1129(b). While we respectfully disagree with that issue and believe 9019 is the right standard, we (indiscernible) difference under our plan because the stockholder settlement set aside both standards.

By conferring a substantial benefit to participating holders of existing stock in the form of a distribution to which they would not otherwise be entitled, the estate could benefit from a consensual Chapter 11 process and releases as a result of the settlement condition. And as a result, we think the settlement falls above the lowest point in the range of reasonableness and it's fair and equitable under 1129. That is it adheres to and actually feeds the absolute priority rule.

THE COURT: Interesting. I'm not sure if either standard applies, but because you're offering something outside of the priority waterfall, it's an interesting question about whether the stock settlement itself, as opposed to the plan, satisfies 1129(b)(1) as opposed to the treatment. It's interesting. I haven't thought about that before.

The -- and I don't know about a settlement. Everybody tells me many things are settlements that I don't think are settlements. But why do you think this is a settlement? Since I'm going to have to -- if I confirm, I've got to find it meets some standard, why is this a settlement?

MR. MORGAN: The way it’s (indiscernible), Your Honor, the existing stock settlement is an exchange between each stockholder and the debtors. The debtors provide a distribution that sort of defies the absolute priority rule and in exchange for satisfaction of the settlement conditions, we confer the benefit to the estate and the reorganized debtor.

That's the -- you know, you have one party providing something and you have one party providing something, and that's the fundamental settlement.

The exchange was proposed to all holders of existing stock as of the record date through delivery of the combined hearing notice in the opt out form, as well as (indiscernible) to the plan and disclosure statement, all which detail the description of the settlement conditions and the third-party releases. We also issued publication notice in the LA Times and USA Today, just to up the world on notice of the settlement.

And so having been provided those materials, each stockholder then has the opportunity to decide am I going to accept or am I going to reject the proposal by choosing to satisfy the conditions or not. And the record -- the voting certification -- the record is that 100 stockholders, more than a hundred stockholders, have rejected the settlement. They've said they don't wish to -- said that they just want that -- they don't want to give what we asked for in exchange for what we were offering, and they said no thank you and they are not participating.

But the vast majority of stockholders, by number, 99 percent by number (indiscernible), chose to participate in the settlement. And if the plan's approved, those stockholders will receive the benefit from the debtor's bargaining,

significantly improve recovery and much more than they would otherwise receive under the Bankruptcy Code. So the question then sort of how the conditions would work, you know, each stockholder is entitled to act on his or her own volition and they get to make an independent individual decision on whether or not to participate. So there was an argument, I believe, in Mr. Chlavin's papers that there's a class-like death trap, but that's not the case, right. And there's also no walk rights, we don't lose our RSA if a certain amount of shareholders don't participate.

If a stockholder rejects the settlement, they do it without consequence to anyone other than themself. That's their right to accept or reject the offer. And finally, and perhaps most importantly, no stockholder is worse off because of the settlement. The worst case scenario for a holder of existing stock that chose not to satisfy the condition is a zero recovery under a plan that's complying with the absolute priority rule. You know, when you have an insolvent debtor, that shareholder would get a zero recovery. So no one is worse off for participating or not.

And then the sort of one last point I'd like to make, Your Honor, is that actually the only way the shareholders could be worse off is the U.S. Trustee prevails in its objection and the settlement is not approved. If the settlement is not approved, then in those circumstances, the

stockholders that wish to sell and wanted to receive a recovery are no longer able to do so. So that's sort of the sum of our thoughts on the settlement.

Oh, and Your Honor --

THE COURT: Well --

MR. MORGAN: Sorry. If you have a question, the other is an aside, so.

THE COURT: Well, the way you're describing it, it sounds more like an offer and an acceptance and a one-on-one settlement of the debtor with each individual stockholder who chooses to accept what's being offered. I'm not sure what standard I judge that under, but that's how it sounds is it's a one-on-one, every stockholder makes its own decision to accept something that is being offered. I guess regardless of what I standard I view it under. But okay. It's maybe closer to a settlement than many things I've seen that debtors call settlements.

Certainly, the stockholders themselves did not negotiate it, so they aren't part of a already agreed-to settlement. They're given an opportunity in the plan to accept something. Okay.

MR. MORGAN: That's right, Your Honor. That's how we've been thinking about it.

And then, Your Honor, releases. (Indiscernible) releases. According to Section 1123(b)(3)(A), Section 10(7)(a)

of the plan provides for the release of certain of the debtor's claims and causes of action against the released party and how the courts apply different standards to debtor releases, we believe the appropriate standard for approval of debtor relief is generally speaking the same as approval of Rule 9019 settlements or that the release otherwise satisfies the business judgment rule, which is, you know, the test under the Third Circuit PWS decision.

So Your Honor, under this precedent, a release by a debtor is appropriate if the debtor's business judgment -- if, sorry, in the debtor's business judgment, any claim of the estate (indiscernible) are for only marginal liability. And here, we submit that the debtor release represents a valid exercise of the debtor's business judgment and should be approved for three reasons.

One, the debtor formed at the direction of the board of directors, a special independent committee composed of one independent director, that's Jill Frizzley. And Ms. Frizzley with the assistance of RLF investigated the viability of potential claims (indiscernible) debtor release and concluded that the debtor release would not extinguish any claim with a significant likelihood of success or (indiscernible) recovery. I think the debtor release is vital to the debtor's reorganization and critical to prosecution of these cases and instrumental in negotiating the plan.

Third, Your Honor, no party-in-interest has objected to the reasonableness of the debtor release. So Your Honor, we submit that the debtor release is justified, fair, reasonable, and in the best interest of the estate creditors and should be approved.

That leads us to third-party releases. Those that are in Section 10(7)(b) to the plan and we believe that the third-party releases should be approved under three premises.

First, third-party releases are consensual under well-established principal as employed by this Court and others in the district. Second, Section 1141(a) of the Bankruptcy Code provides the Court with the authority needed to approve the third-party releases of the type that we have in the plan. And third, even if Your Honor were to determine that the third-party releases are not consensual, we believe they would satisfy the standard articulated in Continental.

To be clear, our view is that each third-party release is consensual. First, as established in the voting certification, the impaired voting classes, Class 3 and Class 4, have unanimously voted to accept the plan and did not opt out of the third-party releases.

Second, non-voting classes -- I'm sorry, non-voting holders of claims that are unimpaired under the plan impliedly consented to the releases because they are receiving adequate consideration for the release by being paid in full

(indiscernible) plan. So admin expense claims, priority tax claims, claims in Class 1 of the priority claim, Class 2 of the secured claims, five general secured claims, are receiving adequate consideration for their relief by being paid in full under the plan.

And third, the deemed rejecting classes, Class 7 and Class 8, were provided with ample notice and an opportunity to affirmatively opt out of the releases by either objecting to the plan or returning a form to the debtors. Debtor provided notice of the opt out through Form 8-K filing on June 2nd that disclosed the terms and conditions of the restructuring contemplated by the RSA, including third-party releases 35 days before the petition date; a Form S-1 filed on June 8, 2020, which included the full RSA as an exhibit and included significant detail of third-party releases (indiscernible) third-party releases; publication notice of the relief, exculpation and injunction provisions, which again, as mentioned was in the LA Times and USA Today; a copy of the opt out notice and confirmation notice, which conspicuously described the third-party releases and the process for opting out and informed holders (indiscernible) class that they would deemed -- sorry, that they would be deemed to grant third-party releases if they did not complete and return the opt out notice.

Your Honor, the return of a significant number of opt

out forms by shareholders demonstrates that the opt out procedures were clear and that the interest holders had sufficient notice to decide whether or not to opt out. Further, Your Honor, courts in this district have approved as consensual similar relief, that even when the effective claimants or interest holders were deemed to reject the plan. In addition, the third-party -- sorry, the third-party releases were a critical negotiated term of the plan, which the supporting note holder would have been unwilling to fund and support the debtor's reorganization.

THE COURT: That one I don't buy, but that's okay. I do not think that the third-party releases would meet the Continental standards, and certainly not as enunciated in the newest Millennial decision. You can't just make it a condition to your approval and say it's necessary to the plan.

(Indiscernible) going to be consensual or they're not going to be.

MR. MORGAN: I understand and I would differentiate us from Millennial in that we're not telling (indiscernible) that they have to release even though they've been kicking and screaming for years. So we are consensual as opposed to the fact pattern there, but I don't know that we need to argue the point, Your Honor, but I -- if you would like to, I'm happy to. We'll keep moving.

So then I want to address the specific points by the

U.S. Trustee because in their objection, they've taken the position that several of the third-party releases are actually non-consensual notwithstanding everything I've just explained and the case law to the contrary. So specifically, the U.S. Trustee objects to the debtor's use of an opt-out mechanism for holders of interest to opt out of third-party releases. They rely on Judge Owens' decision -- primarily on Judge Owens' decision in Emerge. They argue that silence -- this is a quote, "Silence may no longer be construed as acceptance," but Emerge (indiscernible) for several reasons.

First, contrary to the U.S. Trustee's unequivocal pronouncement, the court in Emerge did not establish a hard and fast rule against opt-out notices. In Emerge, deemed to reject equity holders were not receiving any consideration for the third-party releases they were providing. On the facts -- I'm sorry, on those facts, the court in Emerge concluded that it could not find the third-party releases to be consensual because there was no benefit to the parties to be accepted by equity in exchange for their silence, the contract bids principal.

Here, however, because of supporting noteholders' concessions, equity holders would receive a cash payment at a contingent value rate. Accordingly, equity holders that did not opt out of their releases and complied with other conditions of the settlement but manifested their intent to

accept the benefit by remaining silent and not opting out of the releases. In addition, after Emerge, including most recently by Your Honor, in Pyxus, there have been several cases in Delaware approving third-party releases as consensual when an opt-out mechanism was used, including in instances where the class granting the third-party release (indiscernible) reject.

And finally, as recited in detail in our papers, the court in Emerge relied entirely on non-bankruptcy contractual law concepts without considering the impact of 1141 of the Bankruptcy Code on the issue of consent. And Your Honor, the courts have held that -- the courts that have held that silence is not consent did so because they relied on state law contractual principals and asked the question, what's the source of the relief and party's duty to speak?

Section 1141 makes clear that a Chapter 11 plan is broader and more powerful than a state law contract. State law contractual principals are not what makes Chapter 11 plan provisions binding on creditors and equity holders. Chapter 11 plan, though it may be negotiated as binding on creditors and equity holders because it's (indiscernible) in the Bankruptcy Code and federal law principals of res judicata, bankruptcy (indiscernible) is so strong, that Chapter 11 plans are binding on creditors and equity holders even if they're not scheduled as a valid claim, have received any distributions, and are not retaining any interest under the plan.

So Your Honor, in order for a creditor or equity holder to defeat any provision of the plan, it must file an objection to confirmation of the plan and that's because of 1141. If a creditor does not object, it is bound by the provisions of that plan. So thus a bankruptcy filing can be deemed as consent and so 1141(a) of the Code creates a duty to speak. And this court noted that in Melinta, Section 1141 of the Code is more compelling in the contractual arguments (indiscernible).

THE COURT: I did note that. But you're not really relying on 1141 because you did an opt out. If you were really relying on 1141, you wouldn't do an opt out, right?

MR. MORGAN: Literally, what I was about to say is that we've actually gone above and beyond 1141 because we provided a mechanic for opting out.

THE COURT: Yeah, I don't know how those two mesh. I mean, 1141 is sort of this emerging law that I think started with Judge Drain who, of course, we all do look to for his thoughts on multiple issues. But that interplay is kind of interesting. Okay.

MR. MORGAN: I'm sorry, and I'll keep moving on.

There's a number of objections from the U.S. Trustee on the release so I want to make sure we cover them because I know Ms. Casey will speak to them later.

And then, Your Honor, the U.S. Trustee also objects

to the existing stock settlement and argues that the existing stock settlement prohibits shareholders from opting out of their releases. But for all the reasons that I explained before, that's not correct. The existing stock settlement provides new consideration to eligible stockholders in exchange for their cooperation in confirming the plan and in granting the releases. Holders of existing stock are free to reject that exchange if they wish.

Nothing in the plan compels holders of existing stock to grant releases. And further evidence of that fact is that more than a hundred did not and opted out. Four of them are actually even here today prosecuting an objection.

So next, Your Honor, the U.S. Trustee objects to several subsections in the definition of releasing parties in the plan, most of which have been resolved by changes in the amended plan. Specifically, the U.S. Trustee argues that Subsection 1 includes unimpaired claims of interest, but those parties are not provided in the opt out right, which impairs them rendering them no longer unimpaired. Argument fails for the reasons that I mentioned before, so I don't think I need to go back through it.

The U.S. Trustee also argues that Section -- sorry, Subsection 3 requires abstaining creditors to provide releases. We removed this subsection in the amended plan because there are no abstaining creditors, so we just figured it would be

easier to take it out rather than argue it.

The U.S. Trustee argues that Subsection 4 requires rejecting creditors to provide releases even though they will receive no consideration. That is addressed throughout the presentation and our paper and there are no rejecting creditors, only holders in interest in subordinated claims that are deemed to reject.

So with respect to the holders of interest, those holders are receiving significant consideration through participation in the settlement. In respect to holders of subordinated claims, we don't think there are any. No one has asserted them. We're not aware of any. But if there are, such holders are most likely to be interest holders and the subordinated claims being (indiscernible). And -- sorry, 510(b)s. And noteholders, as I noted before, were given clear notice and instructions on how to opt out if they wanted to.

Next, the U.S. Trustee objects to Subsection 5, which includes shareholders in the definition of releasing parties (indiscernible) opt out. As I said earlier, Your Honor, the shareholders have consented to releases through ample notice and (indiscernible) to opt out. And then, I believe this point has been resolved, but the U.S. Trustee also objected that Subsection 6 included holders of indemnification claims.

And finally, Your Honor, the U.S. Trustee asserted that Subsection 11 (indiscernible) releases to a widespread

group of people, none of whom received notice. Believe we resolved this objection by amending the plan to modify that that Subsection is limited solely to the extent that such person that has a legal right in the Clauses 1 through 10 -- has a legal right to compel the party listed in that Subsection and 11, to provide such a release.

And then finally, Your Honor, the U.S. Trustee has objected that the releases provide for -- sorry, that the releases to be provided by shareholders, to the extent that they release acts of malfeasance. We think we've addressed this by modifying the scope of the release for participating class holders to remove criminal conduct. Further, as this Court has acknowledged, while you must carve out such conduct from the scope of an exculpation, it is not required to carve out such conduct from the scope of relief.

And this sort of gets to where I think you may have a slight difference of opinion on whether or not this is actually a negotiated term. Shareholders are receiving a substantial consideration in exchange for, among other things, a release, so we wanted the release -- we needed the release and our counter parties to RSA, the supporting noteholder, wanted the release to be as broad as possible because they didn't want to fund an exit facility and fund a plan distribution and a opinion under the settlement only for those shareholders to then retain claims and turn around and sue them. So it was a

negotiated significant point that, you know, if they're funding, they wanted to make sure they were funding into something that they were not going to be sued from or by those parties. And I understand Your Honor's point about Millennium, so I won't belabor my point. But that is where we think there is some meaningful desire by the parties to actually have third-party releases and to have them be as broad as possible.

THE COURT: Well sure, I understand that. But as I said, I think they're either consensual or they're not and people want to give broad releases or not. There could have been a plan here according to the debtors without any shareholder consideration, so very different than Millennium.

MR. MORGAN: Understood. Understood.

All right. And Your Honor, reading that queue, I'll forego the argument that we comply with the Continental standards.

THE COURT: Yeah, because I'm not going to -- it's not necessary to the reorganization, i.e., without which this company would liquidate. That is not -- without the shareholder -- existing shareholder, whatever we call it, stockholder settlement. Very different.

MR. MORGAN: Understood. Understood. And Your Honor, my personal belief is these are fully consensual, so I don't want to take up your time arguing an alternate theory.

All right. So moving on. Your Honor, I don't

believe there are any other contested portions of our affirmative case. Again, I recognize the letter that was filed by Mr. Hughes (phonetic) about notice. I didn't interpret that and unless Your Honor tells me that you see it differently, I interpreted that as relating to the settlement, not relating to the solicitation. So I'm happy to walk through the balance of 1129 liquidation analysis, feasibility, good faith, the rest of it. I think it's all been covered in our papers.

The liquidation analysis has also been covered at length in the testimony from Mr. Pickering so I'm willing to take Your Honor's guidance on this as to whether or not you'd like to hear it from me. I surely don't want to take up more time than we need.

THE COURT: If it's been -- excuse me. If it's been covered in the submissions, that's fine. And I'm not sure, quite frankly, what is really objected to, so why don't we see if anyone objects to any of these other sections of the Code. I know Mr. Demmy probably has an argument about the -- he does have an argument about the sufficiency of Mr. Pickering's declaration to support certain of these findings, but I'm not sure if there was an objection to those provisions, so we'll deal with that.

MR. MORGAN: I can speak to that, too, Your Honor, if it would be helpful.

You asked at the last hearing, you know, sort of

what's the purpose behind the 1129 declarations, and to be perfectly frank with you, I also asked myself the same question, particularly when we're doing commenting on them. In the end, from our perspective, it comes down to completeness.

We think it's appropriate and best practices to make sure that there's a legal and a factual showing for each element of 1129, even though in some instances it may not be entirely necessary. For example, our confirmation briefs routinely state that the plan does not contain any rate change, even though the debtor's not a utility. (Indiscernible) 112 of our brief. We always then have a fact witness testify that they consulted with counsel and were advised that the plan does not provide for any rate change, even though it's not a utility, which is Paragraph 40 of Mr. Pickering's declaration.

So Your Honor, I think the point that some of these things may not be necessary, we include them for completeness. And as to the competency of a non-management declarant, you know, courts -- Delaware bankruptcy courts have regularly accepted non-CRO financial advisors to serve as an 1129 declarant. A couple examples, for example, Paragon Offshore, Case Number 16-01386; GulfMark Offshore, Case Number 17-11125; Catalina Marketing Corporation, Case Number 18-12794; and Pancakes and Pies, Case Number 19-11743.

So I --

THE COURT: Were any of those in a contested

situation? I have to confess --

MR. MORGAN: I don't know off the top of my head, Your Honor. I don't know off of the top of my head.

THE COURT: I have to confess that I don't think I've ever gotten one from a (indiscernible) advisor basically. He's an advisor, Mr. Pickering. Most of the stuff he doesn't know from firsthand knowledge. Where he's reading the plan, you know, I guess I can read the plan. Where he's -- what I find in the declarations that, that I suppose I disregard every time is any legal conclusions they reach, which often they do. You know, this plan is feasible.

Well, that's part fact, part law. This plan was proposed in good faith, part fact, part law. You can give me the facts that support it, but they're often so conclusory that they're really espousing conclusions that the Court has to reach on its own based on facts. So I don't know if it's important here or not whether who made the 1129 declaration or whether that is really an issue here, so we'll see what Mr. Demmy says, but I found it odd. Perhaps obviously not unprecedented. There are some cases out there. So obviously, not unprecedented, but I will say not typical. Okay.

MR. MORGAN: And then one more point, which is just from discussion I think Your Honor raised it at the very outset on Tuesday, and we had talked to the U.S. Trustee about it, which is you had asked Mr. (indiscernible) some questions, and

I just wanted to take a second to revisit that, make sure we didn't forget anything here.

So as I mentioned before, eligible stockholders received a copy of the debtor's opt out form, which provided a detailed description of the settlement conditions and the third-party releases as well as copies of the combined hearing notice -- I'm sorry, combined hearing notice plan and disclosure statement. The end of July, after the voting agent had completed its service of materials on eligible stockholders, we learned that these forms did not require the stockholders to provide information that we needed to facilitate the settlement distributions in accordance with the settlement.

Specifically, the voting agent advised us that they would need to know a holder's broker nominee in order to exclude a stockholder that elected not to participate in the settlement distribution. So realizing the importance of the broker nominee information, debtor counsel instructed the voting agent to contact those stockholders that submitted valid opt out forms to confirm that they would maintain their opt out election while informing them that we would need additional information regarding their broker nominee.

During that process, the voting agent was unable to reach all of the non-releasing stockholders by phone, either because the holders did not have -- did not provide a phone

number in the opt out form, or because they could not be reached when called. Accordingly, the voting agent sent out a form, emailed all non-releasing stockholders they could not otherwise contact and conclude by saying, Your Honor, these (indiscernible) were made to stockholders who had elected opt out for the clear purpose of acquiring the necessary broker nominee information were made with the best intentions.

And as an end result -- or maybe I shouldn't say as an end result, I shouldn't infer causation, but when the opt out deadline expired on August 17th, the voting certificate confirmed that as of August 18, the debtors had received 110 opt out forms where the election box had been checked. That figure excludes 45 stockholders who elected to change their opt out election prior to the deadline. So doing some simple math, without any changes, the debtor would have received 155 opt outs as of the voting -- I'm sorry, as of the day of the voting certificate.

But there were 45 people who changed their mind. We don't know if those 45 people -- why they changed their mind, but they changed their mind.

THE COURT: So was that before or after they were contacted by Stretto?

MR. MORGAN: I think most of them were after. I don't know for all of them, but I think most of them were after.

THE COURT: And what are you proposing I do with this or not do with this, which is a little unusual situation where there was contact by the debtor's agent to persons who had submitted a form?

MR. MORGAN: So, Your Honor, two things. One, I don't think there's anything for you to do with it and we wanted to include it because the U.S. Trustee had raised a concern and we talked to them and we explained to them what was happening. They understood, but they also wanted to make sure that there was nothing that was sort of known and not disclosed, so it's really a disclosure. I don't think there is anything that Your Honor needs to do with it.

The other thing, two, there's certainly no prohibition on contacting parties, and in fact, there's actually some cases -- I remember the name, but I don't remember the cite, I apologize -- it's Teligent -- where agents do go out and start contacting parties to try and sort of chase people down. I don't think there's any rule or prohibition against contacting people, but I don't think their contact is problematic. And, again, it comes down to the decision of the party, you know, did you want to take the consideration of settlement, did you want to opt out of the release. And so these folks made one decision and changed their mind and made a different decision.

THE COURT: I don't have a problem with anyone

changing their mind. I think people are entitled to change their mind. I think the concern, if there is one, is that the form that went out was subject to vetting and it was subject to Court approval, and the concern I would have if I was contacting parties not to get information about their nominee but to have a discussion with them about their choice is what completely accurate information given to them about their choice so that they know when they changed it that that's what they wanted to do. I don't know that there's anything for me to do about it.

I'm not sure what I would do or could do but that's my concern, that an unsolicited communication asking not only for your nominee information but are you sure you wanted to do this. There may not be anything inappropriate about it. I don't know. But --

MR. MORGAN: And Your Honor, the --

THE COURT: -- concerned. Pardon me?

MR. MORGAN: Sorry. I didn't mean to talk over you.

MS. CASEY: Your Honor, this is Linda Casey --

THE COURT: Yes, Ms. Casey.

MS. CASEY: -- (indiscernible).

THE COURT: Yes.

MS. CASEY: I just wanted to correct something. The U.S. Trustee does not agree that it was just a transparency issue. We thought that it was a necessary transparency issue,

but I do intend to argue, or include in my argument comments regarding this, including a suggestion as to what I think should happen. So I just wanted to be clear that to the extent there was an indication that we just thought it was a transparency issue, that's not what it was and I -- it wasn't Mr. Morgan that I had spoken to. We said we would address it in argument.

THE COURT: Okay. Thank you.

Okay. Then we'll hear what the U.S. Trustee's concerns are and suggestions are and you can address it after I hear that. Thank you.

MR. MORGAN: Okay.

And I apologize, Your Honor. I understood it was just a disclosure issue, so that's my mistake.

Thank you, Ms. Casey, for correcting.

All right. So Your Honor, having asked if anyone had any other objections and having gone through those last two points, I think that's it for me.

THE COURT: Okay. Thank you.

I've got 4:35. We're going to take five minutes. We've been going for two hours. We're going to take five minutes and then we're going to start with the shareholders. We'll start with Mr. Demmy when we return.

Thank you.

MR. MORGAN: Thank you, Your Honor.

THE COURT: We're in recess.

(Recess taken for five minutes)

MR. DEMMY: And as always, I'll do a mic check. Can the Court hear me?

THE COURT: I can. I'm glad you got your power back.

MR. DEMMY: Not long after it went out, but enough to cause a little bit of a commotion, obviously. But thank you, Your Honor.

Your Honor, John Demmy of Saul, Ewing, Arnstein and Lehr, and of course, we represent Steven Chlavin, one of the four objecting shareholders that the debtors have identified and then participated throughout this hearing.

Your Honor, I'll start a little bit out of order perhaps than what I had intended. Your Honor asked a lot of the questions of the debtor's counsel, evidentiary-based questions that I had from the evidentiary record. Debtor's counsel answered them in the manner that he did. I don't know that I need to belabor that point. I will not spend as much time on those matters as I had intended to so I just wanted to note that.

But then I also wanted to shift because there was discussion about the Pickering declaration, so I figured it's an appropriate time, since we're talking about the evidentiary record, to deal with that or at least give Your Honor my view about that declaration. And I think --

THE COURT: And Mr. Demmy, I would like your view. I don't want you to shortcut the evidentiary concerns that you have. I want to hear them.

MR. DEMMY: I will mention them in my presentation. I'm not going to discard them, but I -- some of them I think have been addressed in a way, but I will take Your Honor's point to heart on that issue.

With respect specifically to the Pickering declaration, though, Your Honor, I made this point on Friday. I'll make it again today. I think a fair reading of the majority of the Pickering declaration starting from Paragraph 26 on, which deal with the Section 1129 requirements, are of no help to the Court, or very little help, if any. They are mainly argument or legal conclusions. To the extent that there's an attempt to relate facts, I think that they are based on hearsay conversations or simply a reading of the plan and Mr. Pickering's attempt at an understanding of what the plan -- that's not to say that he doesn't have one, but I just don't think that that is helpful for the Court who, Your Honor, you're the expert on Section 1129. You don't need Mr. Pickering's help to make decisions about whether or not the debtors and the plan proponents have complied with the Bankruptcy Code as required by Section 1129.

And if there are facts that are necessary to have been developed in connection with Section 1129 matters, well,

they either have or have not been, I would suggest, as far as the evidentiary record apart from the Pickering declaration and I don't believe that the Pickering declaration would add to that effort in terms of a factual basis for satisfaction of Section 1129 standards. And I want to mention this and go into some detail on this because I think it really highlights the absence of debtor's management. There are a lot of open questions here that I don't know if they could have been because management wasn't here to testify. Whether Mr. Amos could fill in some of the gaps, whether Mr. Oki could have filled in some of the gaps in the evidentiary record as I think exists, and I think the Court suspects exists or has concluded possibly exists.

So with that, Your Honor, I'm going to now turn to a question that the Court had. It actually -- there were perhaps two questions or two related inquiries and they ultimately relate to this market test that the debtors are relying upon. And the one question that the Court asked was, what is the relevance of the debtor's frame of mind that -- their negotiator's frame of mind with respect to the value of the net operating losses and whether or not it had value to the debtors or substantial value for IEH Biopharma. What relevance is that? And I'll just leave that question hang for a moment because there was also discussion about VI-0106 and Mr. Morgan talked about, well, you know, the answer to that question

depends on whether we're doing an asset based valuation or an income based valuation.

So I think those two are related and they're related in this way, Your Honor. The debtors didn't offer the company for sale. Mr. Morgan talked about unsolicited offers, but unsolicited offers obviously is not a substitute for a marketing process. It's not a substitute for offering the company for sale. I think he also talked about, as part of the market test, 90 percent of the company being offered for sale.

However, that's -- I interpreted that and I think the record would bear out, that that was for the equity in the debtor, and whoever bought that equity would still have to deal with the debt ahead of it on the balance sheets. So that's not really the sale that I would be referring to.

And Your Honor, one of the things, one of the themes of this confirmation hearing, at least for me, has been the, I want it both ways approach. You want it this way, but then you want it a completely 180 degree manner on another issue or another point that might serve your interests in a different way.

And at the very outset of the hearing debtors' counsel started by saying that the debtors -- I'm going to quote this directly I think, and absolutely accurately -- but the debtors did not leave any stone unturned in their efforts here.

Well, they did leave one big one unturned, and that is a sale of the company as a going concern, or of substantially all the assets, not a piecemeal sale, but a sale that we see often in Bankruptcy Court, you know, a going concern or substantially all asset sale.

And if the NOLs had no real value to the debtors or de minimis value and it's been subsumed in the discounted cash flow analysis prepared by Ms. Stratton and Piper Sandler, then why not? Why not offer the company for sale?

Find out what the value might be out there, as opposed to attempting to refinance the debt or finding people to buy the equity at a time, I would suggest, in the spring and early summer of this year, might not have been the best time for people to put money into ventures.

I don't know if there were people that were going to possibly be interested in buying the company, but we'll never know, because that effort was not taken. That stone was left turned.

THE COURT: So your point on the market test -- and that was actually one of the questions I had for you, so thank you for addressing it -- but your point on the market test is that the offering of equity and/or debt in the company in the spring isn't a sufficient market test.

MR. DEMMY: That would be my position, absolutely, Your Honor, because I don't -- it's not a sale of the assets or

of the going concern. It's of pieces of the capital structure. And there might be any number of reasons why investors might want to or might not want to buy a piece of a capital structure of a company that's looking like it's going into bankruptcy, or is engaged in this effort in an effort to stave off a bankruptcy case.

Yes, Your Honor, that's my position. I think the true market test is a willing buyer and a willing seller, and what do you get for the assets or what do you get for the company, and that wasn't done here. With that, Your Honor --

THE COURT: So let me -- so is it --

MR. DEMMY: Yes.

THE COURT: -- of no relevance? Is it of absolutely no relevance that the debtors attempted to bring some investors in? I mean, Ms. Stratton testified that that's an appropriate market test of some sort. Is she wrong on that?

MR. DEMMY: I'm in no position to question Ms. Stratton's judgment on that. I'm suggesting that there are alternatives to what the debtors attempted to do, and the one alternative that clearly was not done, because I asked -- I think I asked Mr. King, Ms. Stratton --

THE COURT: Yes.

MR. DEMMY: -- and all of them whether a sale of the entire company was discussed, attempted, and the answer was uniformly no. So I can't say that Ms. Stratton's market test

is of no relevance. I'm saying it's among the things that Your Honor ought to consider, and in my view, the best market test is a willing buyer and a willing seller.

THE COURT: Okay.

MR. DEMMY: And Your Honor, Mr. Chlavin raised several issues in his objection, including whether or not the plan and the plan proponents had complied with the Bankruptcy Code and Title 11 -- the 1129(a)(1), (a)(2), (a)(3) requirements.

But clearly, the focus of our objection during the confirmation hearing has been on valuation. So I'm going to focus now on 1129(b)(2)(C), the fair and equitable standard, because that gets to the heart of the case, it seems to me, the value of the debtors.

And 1129(b)(2)(C) says that equity-holders must receive on account of their interest, property of a value as of the effective date of the plan equal to the value of such interest. So I'll first simply note that the value of the debtors needs to be determined as of the effective date of the plan.

And I will note that the Piper Sandler valuation, the valuation analysis by Piper Sandler was as of June 29, 2020, which is two months ago, and that was prior to the commencement of the bankruptcy cases. Ms. Stratton did testify that I think it was on August 11 -- I think that appears at page 48 of the

August 25 transcript; I want to make sure I got that correctly -- that Ms. Stratton testified on August 11 she and her team updated the Pipe Sandler valuation analysis. It increased the debtors' value by $6 million.

However, no written analysis of that updating was provided. There was -- as I understand it, we don't know exactly what the information was that went into that. There's no documentation of that increase in the valuation analysis. But again, that's on August 11, a little in time to the effective date.

So I'm not going to stress, overly stress that point, but I note that the valuation must be as of the effective date, not June 29 of 2020, and the meat of the evidence in the valuation analysis that's been provided here by Piper Sandler was as of June 29th, and that's not exactly the effective date of the plan. And in other cases --

THE COURT: Well, it isn't.

MR. DEMMY: -- Your Honor --

THE COURT: Yes. Okay.

MR. DEMMY: I'm sorry.

THE COURT: In other cases what? Tell me.

MR. DEMMY: Well, in other cases that have a longer runway and more activity in the cases where the debtors actually file monthly operating reports and do financial statements throughout the case there might be an opportunity

for the valuation analysts to provide a -- a valuation analysis closer in time to the effective date, because there might be more information available.

We heard testimony that there was some other additional information, some financial statements that were prepared by the debtors. Mr. Pickering testified that he updated his analysis based on updated financial statements, and I believe some financial statements that related to the post-bankruptcy period of time.

But those financial statements were not produced. They weren't filed with the Court. They weren't, you know, a subject of conversation at this confirmation hearing. So it was possible to update it, I think. And in other cases you might have more time and a longer runway in order to update your financial information, but there's some other issues with the timing that I'll get into a little bit later in my argument, Your Honor. I don't -- you might have had a question and I don't want to go off there without --

THE COURT: Well, you know, it just struck me that you don't necessarily know what the effective date is going to be of your plan.

MR. DEMMY: No.

THE COURT: When you file it. This was a pre-pack. I actually pushed the confirmation date off, I forget now, a week or so. So that's hard to know, and it's also future

looking. So I actually don't know that a banker would push it out into the future and say, well, as of this date that hasn't occurred yet here's my valuation analysis.

MR. DEMMY: No, I'm not suggesting that, Your Honor. What I'm suggesting is that there's discretion involved in valuation analysis, and that is a piece of it. And there's other pieces, as well, and I'll get into those.

THE COURT: Okay.

MR. DEMMY: But that could have been done. It could have been -- there could have been a more fulsome update done, but it wasn't. We had the testimony about the 6 million, and I'm not trying to gloss over that. It's just that it wasn't as fulsome, obviously, as the June 29 valuation that was appended to Ms. Stratton's declaration.

And I note that if they did the updated work on August 11 there could have been some things attached to her declaration, which was filed I think August 19 or something like that. I don't want to mis-state the date. My friend is helping me out, as well.

(Laughter)

MR. DEMMY: So Your Honor, I referenced the having it both ways phenomenon, what I perceive is part of what's going on here. And I'm going to start with VI-0106. We've had a lot of discussion about VI-0106, so let's just get into it. And the company -- the company's witnesses I should say, because I

think there's a distinction between the company's witnesses and the company, perhaps, on some of these issues that Your Honor has recognized.

But the company's witnesses uniformly say it's valueless or it's of de minimis value, that the company doesn't have the money to develop VI-0106, that it's a drain on the company's resources, and so forth and so on. And that's despite the corporate presentation of June 19, 2020, which painted a much rosier picture of VI-0106.

And it wasn't simply a, boy, we think it's -- it could be a little bit better than zero. It was significantly better than zero as a projection, and I know the word "aspirational" was used a lot, but it -- the statements in the June 19, 2020, corporate presentation presented a potential revenue stream for VI-0106 of 10 times the company's projected 2021 revenue of $119 million.

And that's some pretty rosy projections when the testimony at this confirmation hearing has been very doom and gloom. It's speculative. It's that we don't have the efficacy studies done; it's going to cost a lot of money. We don't have the money, and it sounds like the debtors almost are of the view of abandoning VI-0106, because of all the negatives and all the drawbacks to it.

However, company doesn't want to sell it. My client made an offer based on what the debtors were saying, which is,

this thing is valueless. So we made an offer, which was responded to basically with a stiff arm, and that was set forth in the confirmation brief that the debtors filed.

So if it is truly valueless and if it is really a drain on the company's resources and if the company really doesn't have the money to spend, whether it's 20 million or 70 million over two years or over seven years, why not sell it or at least set up a process to sell it, and extract some value from an asset that otherwise seems like I'm wondering why it's still part of the debtors' asset list, if it has such little value.

THE COURT: Well, does the debtor have to do that in the context of this type of plan that is -- if it's validly and appropriately valued, VI-0106, then why can't it just flow through as an asset of the company?

MR. DEMMY: Your Honor, I don't think there's anything in the Bankruptcy Code that compels them to sell that asset. But what I'm suggesting is that the debtors are saying to the Court that this plan's proposed in good faith, that it meets all the requirements of the Code, and one of which is that the plan is in good faith and the proponents have acted in good faith.

And if this asset is truly valueless and it's going to be a drain on the company and cost tens of millions of dollars why wouldn't the debtors properly exercise their

fiduciary obligations to all stakeholders in the case by trying to extract whatever value they can from it.

So no, directly in response to Your Honor's question, they wouldn't be compelled to do it, but it seems to me that in the fair discharge of fiduciary duties in this case, it's something that they should have considered along with the sale of all the assets of the company or the company as a going concern.

It's the same problem, that this asset, the debtors want to retain it, and in the context of the debtors' management -- who didn't testify -- but the debtors' management saying, this is going to be a big winner. And I'm going to suggest, Your Honor, that shareholders, you know, despite the existing shareholders' settlement, are not going to participate in any of that upside.

They're not going to participate in the upside of VI-0106, because it's not included among the assets that are part of the existing shareholder settlement. There are EBITDAR milestones under that settlement, and if the company reaches it then the shareholders get the $2 per share.

However, VI-0106 is not included among those assets for which the EBITDAR calculation will be made. And in fairness, the R part, the R&D costs for VI-0106 are not included, as well. It's earnings before that -- that number. But here's the interesting part.

The EBITDAR milestone in the existing stock order, again, it was $98.5 million. The EBITDA number in the company's financial projections that are attached to the disclosure statement, Exhibit E, are $76 million, and if this is for the same measurement period, 2021 and 2022, that surely suggests to me that the R part of EBITDAR is going to be 22.5 million.

And that sounds suspiciously like what Mr. King thought the debtors were going to spend over the next couple of years with respect to VI-0106. So we have this worthless asset the company doesn't have the money to develop and it's simply a drain on the company's resources, and it's speculative and we don't have the right information about it, but we're going to spend $22 million over the next couple years trying to develop it, which suggests to me that if they don't spend that money, if you take the company's witnesses at their word, that this is just a big negative, a big, worthless, black hole that we shouldn't go into, maybe the company's EBITDA for 2020 and '21 could really, actually be 98.5 million, because you don't then spent the R part.

You don't spend the research and development on VI-0106. And maybe then you'd have a lot more EBITDA, $22½ million -- and I know that EBITDA and free cash flow, which is what Piper Sandler used in their discounted cash flow analysis of not the same numbers -- however, I think they're cousins of

each other, and it stands to reason that if EBITDA is $22½ million more, the pre-cash flow number is going to be more, maybe not 22½ million because of -- you know -- the way you do that, that math is somewhat beyond me.

But if you had a much higher EBITDA or free cash flow for 2021 and 2022, the valuation's going to go up, and Ms. Stratton was very clear in testifying that. If that free cash flow number increases, the value's going to go up. Now, I can't tell you how much, Your Honor.

That's not my expertise. I can do some simple math and we'll do that a little bit later, but I can't do that kind of math. But it's another one of these, it's worthless but we're going to spend money on it, and if we do spend money on it, it actually, directly impacts the financial projection and the valuation that's done based on those financial projections; and I think that's inconsistent.

THE COURT: Well, where's -- so you're just -- you're implying the spend of $22½ because of the difference between the EBITDAR and the contingent value right document, which quite frankly, is interesting that it excludes VI-0106. That is not something I had picked up on before the hearing.

But you're comparing the EBITDAR number in that to the EBITDA numbers in the financial projection disclosed in the disclosure statement and the appendix.

MR. DEMMY: Yes, that's correct.

THE COURT: And coming to some conclusion about what that difference is?

MR. DEMMY: Well, we know what the difference is. It's R, EBITDAR versus EBITDA. The R is research and development.

THE COURT: Well, I --

MR. DEMMY: And maybe not all of it. And what I'm saying is that Mr. King testified, and I think Mr. Morgan referenced it, that the company would be spending $20 million over some period of time of the -- on this worthless asset. Sounds like the R part of the EBITDAR, which is being excluded -- and remember, it's only the R for VI-0106, I believe. Maybe I misstated that.

THE COURT: Yes.

MR. DEMMY: But that's where I'm getting that from.

THE COURT: So you're --

MR. DEMMY: Yes.

THE COURT: -- so you're comparing two benchmarks that the debtors have given us and saying the only difference is the R. So that must be the difference.

MR. DEMMY: Yes, that's exactly right.

THE COURT: Okay.

MR. DEMMY: So a word that I've been thinking about during this hearing is discretion, but I also think of the word artistry, and I don't mean that -- I mean it the most

complimentary and respectful way, that I think Ms. Stratton and the Piper Sandler team are good artists.

They're good at what they do. They exercise their discretion in a way that, you know, is what they think is appropriate, but it might not be appropriate for all situations. And I'll take up on what Dr. Ahmadi said, and I don't think it matters whether he's an expert witness or not.

Mister -- or Dr. Ahmadi, I'm sorry, said during his testimony that the math in the valuation analysis is relatively simply. Once you have the inputs, the selection, you know, the criteria for and the selection of the representative public companies and the criteria for and the selection of the precedential transactions, the financial information that goes into the projections, you know, future revenues and the discount rate to be applied for a DCF analysis, once you have those inputs and you have those charts that we saw that were attached to Ms. Stratton's declaration, and part of her valuation analysis, from there, then, the math is pretty simple, and I would tend to agree with that.

It's the first part that the discretion is applied or the artistry comes in, and I think Ms. Stratton candidly testified that there were some areas where she exercised discretion that others could exercise discretion in a different way.

So and this might seem like a trivial thing, but I'm

going to start with the median versus mean. And is it trivial? To talk about it maybe, but it has a big affect here. If you look -- and Your Honor, I want to refer to some of the charts that are in Ms. Stratton's declaration. So I would ask you to turn to that, please.

THE COURT: Okay. Give me a second to find my copy. Okay.

MR. DEMMY: So I want to start with the selected public companies chart, which is page 7. And by the way, for the record, this -- what I'm looking at is the preliminary discussion materials from Piper Sandler, mister Pat --

THE COURT: I'm sorry. Mr. Demmy, can you give me one moment? I'm sorry.

MR. DEMMY: Sure.

THE COURT: And I'm just going to mute you guys for a moment. I'll be right back.

(Off the record)

THE COURT: My apologies. I'm sorry, Mr. Demmy.

MR. DEMMY: Thank you, Your Honor.

THE COURT: Mean and median.

MR. DEMMY: Yes. And I was just identifying for the record the document we're looking at, which is Exhibit B to Ms. Stratton's declaration. Okay. So we're on page 7, and in the selected public company or public comparable valuation analysis, Piper Sandler used as a multiplier the 2.8 number

that appears at the -- near the bottom of the far right-hand side.

There's the EV revenue, LTM 2020/2021, and under 2020 there's the 2.8 number. And that's the multiplier that Piper Sandler used, and Piper Sandler used that 2.8 because it's the median, the number in the middle of all the numbers in that column under 2020.

Actually, it's not quite true. Piper Sandler took 2.8 and then for some reason wanted to produce a range so it backed the 2.8 down by a tenth of a point underneath and a tenth -- and it added of a point on the other side to get a range of 2.7 to 2.9, although I'm not sure how those numbers relate to the numbers in the column.

But in any event, to produce a range for its public company valuation, Piper Sandler used 2.7 and 2.9, but the median is the 2.8 figure. And again, Your Honor, this is where the simple math comes into play. If you simply add the numbers in that 2020 column, you get 58.4.

There are 16 numbers in the column. You do the division, and I'll simply represent that that number is 2.65. That's the mean. That's the average. If you take 3.65 for 2020 and multiply it against the estimated 2020 revenue of the debtors of $77.2 million, that produces a number just under $282 -- I'm sorry -- $282 million. At $282 million, Your Honor, the debtors are solvent.

THE COURT: Okay. I want to make sure I'm -- I've got this. So you're taking on page 7 of Ms. Stratton's declaration the last 12 months of 2020 EV revenue.

MR. DEMMY: No. It's the number that Ms. Stratton -- that Piper Sandler used was the 2.8, which is in the next to last column under EV/revenue and under the year 2/20.

THE COURT: Yes.

MR. DEMMY: 2020. Sorry. Those are the numbers I'm referring to.

THE COURT: And you say, if you take the mean, the average, and not the median, that number is -- the mean is 3.65?

MR. DEMMY: Correct. And now, if you use that as the multiplier, and multiply 3.65 by the 2020 revenue of 77.2 million, it produces a number just under $282 million. Now, if we really wanted to apply some additional discretion here we can do that in a couple of ways with regard to the revenue number.

And first, Your Honor, and let's get back to what management said on June 19, 2020, and what it said was that the revenue projection for Pancreaze was up to $100 million. And in the exercise of discretion in the valuation process that number was back down to $68 million.

So if we use a higher number for Pancreaze -- again, that's -- I'm not going to do this math for you, but it just

stands to reason, if you use the 100 million or some number above 68 million for Pancreaze, you're going to get a higher valuation, presumably, because the revenue number for 2020 that you just multiplied the 3.65 multiplier against would be higher, results in a higher number.

Second application of discretion regarding revenues, Your Honor -- and I asked this question of Ms. Stratton and she pushed back on it -- but what if the more realistic revenue projections are the 2021 numbers, which begins a mere four months form now.

The 2021 revenue projection is $119.4 million, which represents a 55 percent jump in revenues from 2020. And wouldn't that actually be more representative of the effective date value, since 2021 is only four months away and 2020 might be considered an irregular year for a lot of reasons?

The debtors were involved for a long period of time in refinance efforts, spent time in bankruptcy pre-planning, spent two months in bankruptcy. I just did the math, Your Honor. It's just a data point here. If you use the 3.65 multiplier against 2021 revenue the valuation number would jump to $435 million. And people would say, you know, that's crazy. You're using apples and oranges. Well --

THE COURT: Yes.

MR. DEMMY: -- if you use Piper Sandler's 2.8 against the 2021 revenue results that's 334 million. If you use the

2021 mean, not the median, but the 2021 mean, and those numbers are provided, and the mean in the 2021 column would be 2.54. Again, that's very simple math.

Just add up the numbers and divide, and you multiply the 2.54 against 2021 revenue to provide an apples to apples comparison, the valuation number would be $303 million. And again, clearly solvent.

THE COURT: But didn't Ms. -- well, I got a lot of questions on this, but didn't Ms. Stratton push back, as you said, by saying that you would have to add -- you'd have to consider expenses. You'd have to consider something. She had something that you were supposed to have to consider if you were going to use 2021, which she says you would not use, and it's not appropriate to use in the methodology. But if you were you would have to include something else.

MR. DEMMY: So Your Honor, I think what she was referring to was the discounted cash flow analysis, because the public comparables and the selected precedential transactions simply rely on the revenues. They don't take into account expenses.

THE COURT: True.

MR. DEMMY: If you go to page 5 to illustrate that point, under the first column is public trading comparables, and you'll see at the very bottom in the lighter blue shaded rectangle it has that median range that I talked about, 2.7 and

2.9, multiplied by 2020 estimated revenues of 77.2 million.

So expenses aren't a factor there. And the same for the precedent transactions, the next column over, and there you're using LTM, which means last 12 months, as of 3/31/2020 revenue. Again, the expenses are not part of that calculation. It's -- and I acknowledge she did push back on the discounted cash flow piece of this that --

THE COURT: Okay.

MR. DEMMY: -- an increase in revenues doesn't necessarily all flow to the bottom line of whether it's free cash flow or EBITDA. That is correct.

THE COURT: Okay. But so financial advisors who are doing their valuations or bankers that are doing their valuations do make judgment calls. We all know that.

MR. DEMMY: Yes.

THE COURT: That a valuation is part art, part science. You may say more art than science, but it's both. And it's -- it is striking that the change of one judgment call from mean to median in the DCF analysis -- I think I've got it right, or maybe I'm wrong -- if --

MR. DEMMY: We were looking at the public comparables, yes.

THE COURT: And the public comparables -- yes, sorry -- and the public comparables analysis makes such a big change. But nonetheless, that is a judgment call.

MR. DEMMY: Yes.

THE COURT: And am I correct that she said that her firm -- that that's the default position of her firm. So she didn't look at the mean and look at the median and then make a decision here on which to use. She said, this was the default position of her firm on how they -- on what they do.

And if that's the case, which I believe it is because that's what she testified to, then why should I disregard her choice in the face of not having another expert to tell me why, in fact, that's wrong here.

MR. DEMMY: Well, Your Honor, I think you have the power to disregard her choice, and it's based on the totality of the circumstances here. There are many data points that would lead or could lead a third party, an objective third party, to conclude that this debtor is solvent, the debtors' companies are solvent, because there are different metrics that can be applied.

You have differences -- and it's not just the one discretionary issue. It's that when it's the revenues that are used. It's the involvement of Piper Sandler in connection with the financial projections and the discounting of revenues, for example, the Pancreaze and the discounting of the VI-0106, and we've heard a lot about those things.

There are different methodologies, and Ms. Stratton testified to this, that it wasn't wrong, it wouldn't be wrong

in her view to use the mean. It's just that she doesn't use the mean. And one of the reasons why she said that in her view the mean was not the proper metric to use is because of the so-called outlier issue.

So I'd like -- if Your Honor is not wanting to ask a different question, I'd like to talk about the outlier, because I think it is responsive to what Your Honor is getting at here. She justified the use of the median and not the means by saying, well, there's outliers with mean and you have to, you know, deal with that.

What I would say about that is I don't really understand that, because Piper Sandler was the one that picked the criterion. It picked all the characteristics of the public comparable companies and all the precedential transactions that went into its analysis.

And you heard Ms. Stratton testify that they spent countless hours and did a really -- made a big effort to come up with a criteria and spent a lot of time doing it, and I don't doubt that at all. If they did that then why are there any outliers?

Why wouldn't the outliers have been dealt with in the selection process, in the criteria? If you're looking at a list of companies -- and Ms. Stratton testified that there was, you know, there was a minimum revenue level, a maximum revenue level and various other criteria, and I don't know that I can

recite them all here -- but once you've done that, why is there an outlier for which the mean would not be applicable or that the mean would not credibly take care of or not be an issue in respect of a mean calculation.

And Dr. Ahmadi -- again, I don't think this is anything that relies on his status as an expert or not, but he testified just as a matter of common sense, when it comes to statistics like this sometimes, you know, the result can be determinative or can be something that you're pushing towards.

I'm not saying that Ms. Stratton did that. I'm saying that that possibility exists. And statistics can be used in many ways to get to the desired result. And the use of a mean or a median is not a particularly complex decision to make once you have the data set.

The data set is fixed. So you're not using one or the other to necessarily manipulate the data if the data is there. It's simply a way of expressing what that data means. And what I'm saying to Your Honor is that there are expressions of the data set that Piper Sandler used which this company is clearly solvent.

MR. DEMMY: Your Honor, I would like to go to the selective -- I keep saying this wrong. I keep wanting to say selective presidential [sic] -- maybe I'm too caught up in the election, but it's selective precedent asset purchases, and they appear on pages 8 and 9.

And here, Your Honor, you have to look at both charts together, because Piper Sandler used the medians on page 8 and 9, and those are reflected in the last column of each of those charts, and for the chart on page 8, the number, the median number is 3.3, and on page 9 it's 3.1.

And I'm not sure why Piper Sandler did this, but in then applying those numbers to the LTM revenue, last 12 months revenue number, which produces the collective precedent asset valuation number, they didn't use 2.1 and 2.3. They used 3.0 and 3.4, and I'm unclear as to why it did that.

But clearly, that is another application of discretion, it seems to me. And when you apply the 3.0 and 3.4 -- and I'm going to go back to page 5 really quickly -- but when you apply the 3.0 and 3.4 to the LTM revenue you get that range of 220 to $249 million.

So here's the problem, again, and the one is the one I've been talking about. If you look at the mean for those two data sets, the mean numbers are 3.3 and 3.7. I'm sorry. Yeah. That is correct, the 3.3 and 3.7. You don't get as good of a result when you use those numbers against the last 12 month revenue of 73.3.

That range is only based on those increased multipliers. It's only 242 to $271 million. But here's the issue with that, Your Honor. And again, we're supposed to use -- we're supposed to value this company as of the effective

date, and the LTM revenue number that was used was that of March 31 of 2020.

That was the revenue number for the last 12 months that Piper Sandler used. That is five months ago. And we know that the debtors have updated information. It seems to me that this is the number that could have been updated, but wasn't. I don't know what the result of that would be.

But here's another application of discretion, and perhaps another hole in the evidentiary record, what were revenues for April, May, June, all pre-bankruptcy months. So I wanted to point that out, that again, there's application of discretion here, because you have the median numbers of 3.1 and 3.3.

Piper Sandler didn't actually use those numbers. They used a different set of numbers, and it stopped its last 12 months analysis on -- as of March 31, and it did so as of June 29. Again, April, May, June, almost three months had passed as of June 29 when Piper Sandler did its selective precedent acquisition analysis.

And it seems to me that that's -- that is a hole in the factual record that might be interesting to find out about, but maybe we won't. And I want to turn to the discounted cash flow, discounted cash flow valuation analysis for just a moment.

And again, I'm going to nitpick. Mr. Morgan's right,

we're nitpicking it in a way, but it's a lot of information that if you put it all together there could definitely be a different conclusion about the value of this company. And as Your Honor recognized at the equity committee hearing, you know, it seems like, well, maybe it's so close that it could be tipped over, and it's so close that reasonable minds would differ, and it's so close in certain respects, but then in other respects, not very close if you use different end points, if you exercise your discretion in a little bit different way.

So let's talk about discounted cash flow for the moment and the weighted average cost of capital. One of the things that apparently was an exercise in discretion by Piper Sandler was that it used an assumed market rate of 13 percent for the cost of debt.

And just so we can follow along, Your Honor, the weighted average cost of capital analysis is on page 11 of the exhibit we were just looking at. So we have the cost of debt number of 13 percent, and we know that the exit financing that the debtors have lined up in 11 percent.

Piper Sandler used 13 because that was its estimate of what the market rate would be. Seems to me we know what the market rate is for this debtor, because we have the exit financing and it's at 11 percent cost of money. Another area where I believe Piper Sandler used its discretion was in the ratio of equity to debt capital.

Again, Piper Sandler said, we looked at the market and used 75 percent equity and 25 percent debt in the long-term capital structure estimates. That's at the top right-hand column of page 11. And you see when you multiply the equity in the debt, you multiply them in the material below it. You multiply the equity -- I'm sorry -- the 75 percent portion of equity by the cost of equity of 21.2 percent and you age 15.9.

You then multiply the portion of the debt, which is 25 percent, by the cost of the debt, which is 9.8 percent, and you get 2.4. You add those two numbers, you get the weighted average cost of capital that Piper Sandler used. My contention, Your Honor, why would the debtors' actual equity to debt ratio not be used?

We know what it is as of the effective date. And let's just take the Piper Sandler valuation now, since it's $231 million with a $90 million exit facility. That's more like a 60/40 split, not a 75/25 split. And the weighted average cost of capital comes down if you use 50 percent of equity times 21.2, as opposed to 75 percent.

I'm not going to do that math for Your Honor, because it's a little harder to do and I don't think it's valuable, other than to note that it's not just one item. It's a number of items that go into this valuation analysis that are concerning, and that on -- in balance, the totality of which I believe gives Your Honor the discretion, as the finder of fact

and law here, to find that this valuation analysis does not meet the debtors' burden.

THE COURT: And I can do that --

MR. DEMMY: And what I want to reference, one of the things I --

THE COURT: -- and I can do that even though I don't have a competing analysis that shows me some qualified expert who comes up with a -- who uses his or her discretion differently, and suggests --

MR. DEMMY: I think you can, Your Honor --

THE COURT: -- and suggests that Ms. Stratton is mistaken because of x, y, z reasons.

MR. DEMMY: Yeah, I think you can do that, Your Honor, because for a large part I have taken what Piper Sandler and just applied a little bit different input. And Your Honor can make the decision whether or not you think the mean is more representative or the median is more representative, or whether the last 12 months of revenue as of March 31 really gets us to an effective date valuation.

There's any number of issues that Your Honor I believe can consider, and even in the absence of a qualified expert say, I don't find this valuation to be reasonable under the circumstances, that it raises more questions than it answers, perhaps, and I can't find that the debtors met their burden.

It's not a shareholders' burden at this point to disprove the Piper Sandler valuation. It's the debtors' burden to prove that the valuation is correct.

THE COURT: And what would I base my judgment on? What would I base my judgment on that says that I question Ms. Stratton's use of the median instead of the -- or the mean instead of the median? Would I go to a treatise and say, ah, well, so and so, you know, says the default provision should be the median unless there' are circumstances that say otherwise? What would I base my judgment on?

MR. DEMMY: Well, on a couple of things, Your Honor. One, this is not your first valuation and your experience always is brought to bear on questions like this. Second, the concept of mean versus median is not, to me, the subject, necessarily, of expert testimony.

It is something that people that have taken a statistics course can understand, and how one or the other may more accurately reflect the data set. So I think you have plenty of authority in those ways to do that, Your Honor.

THE COURT: I don't remember what my grade in statistics was.

(Laughter)

MR. DEMMY: I remember mine --

THE COURT: Okay.

MR. DEMMY: -- but I'm not going to say it. No. I

will say it, because somebody will say that Demmy didn't know what he was doing and got a D. I got an A in statistics, but that was a long time ago.

THE COURT: Right.

MR. DEMMY: Enough said.

THE COURT: Well, mine was probably longer. Okay. Go ahead.

MR. DEMMY: So Your Honor, another thing that I think that the Court has to consider here is the overall timing of the way this transaction has come about and the component parts. And I'll just get this very quickly, Your Honor. In or about May, early June at the latest, and by early June, I think June 1, but at some point in that time frame the goal became clear that VIVUS was to end up as a private company, solely owned by IEH Biopharma, holding over $600 million in NOLs.

That was when the deal between the debtors and IEH was struck, and those NOLs, by the way, I think it's clear, they can be used going forward if there's some future merger or acquisition by VIVUS. And we've also heard a lot of discussion about the substantial value of those NOLs, not necessarily to the debtor, but to -- potentially IEH Biopharma.

But to get there equity has to be wiped out and there needs to be a valuation analysis that shows that the debtor is solvent -- or insolvent, rather. That analysis wasn't done until June 29. Now, I'm not casting any aspersions or trying

to do anything along those lines.

I have the utmost respect for the professionals involved here, but the timing has to be taken into account, but -- and then the exercise of the discretion, an insolvent company was part and parcel of the agreement that was reached.

THE COURT: Let me ask you a question, since you commented. In this context, in the 1129 context, is the value to IEH of the NOLs, as distinct from some other party, relevant?

MR. DEMMY: I think it's relevant, Your Honor, from this perspective, that the plan and the plan proponents must have proposed the plan in good faith and it must otherwise comply with the requirements of the Bankruptcy Code. So if this plan is more about preserving the NOLs for IEH Biopharma, rather than preserving value and achieving value for all stakeholders -- and now, I'll go back to my refrain about the sale process not having occurred -- if that sale process might have provided more value then I think the debtors were duty-bound to pursue that path.

Excuse me, Your Honor. And if the debtors did not pursue that path because it had a deal with IEH Biopharma, because the NOLs were extremely valuable to IEH Biopharma and that was the nature of the agreement that was negotiated, I think it is relevant in that context.

We don't know a lot about those negotiations, because

the negotiators aren't here. They didn't testify. So that's a problem that I guess everybody has to grapple with. Your Honor, unless you have other questions, I have concluded my remarks and I'll sit down.

THE COURT: Let me ask you a -- back to the Pickering declaration. If I were to find that it's either all hearsay or a legal conclusion and doesn't support the debtors' confirmation, what absence do you think the debtors have in their proof? What absence is there? What -- which 1129(a) standard haven't they met?

MR. DEMMY: It's a good question, Your Honor. I think that -- and I'm being as candid as I can -- I think that many, if not most, of the 1129(a) standards are observable from the plan, the disclosure statement, the solicitation, the voting results or the docket generally.

So I don't know, frankly, if there's an 1129(a) requirement that's not satisfied if the Pickering declaration is not given any weight at all in those regard. I believe it shouldn't be because in the context of a contested confirmation I don't think it was appropriate.

And I think it highlighted the fact that I still don't understand why the advisers testified and management didn't, but I've beat that dead horse, but I have not gone through it, because we -- our objections were fairly narrowly focused on the issues that I've raised.

So we did not go through all the 1129(a) requirements, and Mr. Pickering's declaration with a view of contesting them. So Your Honor, I don't know the answer to your question directly, but I wanted to give you an explanation of where we were coming from with regard to the Pickering declaration.

THE COURT: Okay. Thank you.

MR. DEMMY: Thank you, Your Honor.

THE COURT: Before I go to -- I will go next to Mr. Manousiouthakis, before, though, I need to make a quick call on another matter. But I'm talking like five to 10 minutes. So we'll take a 10-minute break, and then Mr. Manousiouthakis, you would be up. Thank you.

(Recess at 2:59 p.m., until 3:09 p.m.)

THE COURT: Okay. We're back on the record. Mr. Manousiouthakis.

MR. MANOUSIOUTHAKIS: Thank you, Your Honor. I'd like to take a few minutes, given the prior discussion with Mr. Demmy, to kind of clarify that no special prerequisite knowledge is really needed for this median concept to become very clear. It is very simply.

So I want to go to Ms. Stratton's (indiscernible) valuation on the threat to public comparables, the list that she gives you on page 44. Do you have that?

THE COURT: Yes, her selected public comparables.

MR. MANOUSIOUTHAKIS: So just to show you how simple this is, if you look at the very first entry, Accorda (phonetic) Therapeutics, there's a number of 36 in the market cap column. So if you add 36 with the number in the third column, total debt, 242, you get 278.

Then you subtract the top number in the second column, 123, and you get the number in the fourth column, 152. That's it. So now, what is the concept of the median? It takes each column, like you see at the bottom it says, the median needs let's say 426 in the fourth column, okay.

So then what one needs to do is, you take all the numbers in that column, the 16 numbers in the first column -- the fourth column, and you just rank them, which one is the highest, 1,003. Which one is second highest, 665, and so on and so forth.

But then after you rank them you says, I have 16 numbers, the only importance of these numbers was when you did the ranking, because you picked the highest, the second highest, the third highest. After that point their role in the median computation is zero.

The only thing that matters are two numbers, the 431 for Biodelivery Sciences, and the 421 for Therapeutics MD. And these, their average, if you see the numbers 426, it's the average of these two numbers. So what that means is that this is a completely insensitive metric.

If all these other numbers -- you get the 1,003 -- the only (indiscernible), 64 and so on. If all of these numbers were 1,000 it would not matter at all in the computation. It's a completely insensitive metric, and what becomes super important in that table is the statement on the note that these are companies with valuations that are between -- Enterprise valued between 150 and 1 billion. Who picked that? Why? Why this?

Essentially, what that determined effectively in a backward manner is which are the two magic companies that would make the median. So it's -- you know -- so that's all I wanted to say about that, and I think I -- I hope I have conveyed the simplicity of what we're talking about.

THE COURT: Well, let me ask you a question since you've explained that so nicely. In what circumstance would someone use a median, given that it's insensitive to certain analyses?

MR. MANOUSIOUTHAKIS: I would never use it. Now --

THE COURT: Not in anything that you've ever done as a professor. You would never use it?

MR. MANOUSIOUTHAKIS: Never use it because it's not representative of the data. The data can vary tremendously and the median stays the same, identical. It's an incredibly -- you know -- it's what I called before, the sensitivity of it is a discontinued response (indiscernible)

THE COURT: Yes.

THE CLERK: Excuse me, Your Honor.

THE COURT: Yes.

THE CLERK: This is Ginger. Is there any way we can get him to speak up a little bit? I'm barely getting him.

MR. MANOUSIOUTHAKIS: Okay. Thank you. Is that better? Okay.

THE CLERK: A little bit.

MR. MANOUSIOUTHAKIS: I can keep the -- let's move it closer. Okay. Have I answered your question, Your Honor?

THE COURT: Yes.

MR. MANOUSIOUTHAKIS: So it's a very insensitive measure, and it's not reflective of the data. The only influence it gives on the data is when you do the resale ranking. After that, it's (indiscernible) influence. The other thing is it gets tremendously affected by why do we get 16 companies.

Why not 20? Why not 24? Why not 30? Why 150 million or billion? Maybe it's still 3 billion as another number, and so on.

THE COURT: Okay.

MR. MANOUSIOUTHAKIS: And this is why I made --

THE COURT: But there does have to be a choice. There has -- there does have to be some judgment that's exercised to come up with public comparables.

MR. MANOUSIOUTHAKIS: That's correct.

THE COURT: And Ms. Stratton testified that they established a standard and then they used every company within that standard.

MR. MANOUSIOUTHAKIS: I am not saying that they are manipulating in any way things. It's just a matter of what is the 150 million or what is the 1 billion. Where are they coming from? They are crucial. And if you remember, I established earlier during Ms. Stratton's questioning, that the two lowest companies, Accorda and Adamas (phonetic), said zero pipeline drugs, only one or two drugs, no license drugs and so on.

They were really not comparable to legals. Why are they not on the list? Well, what they're doing is they're lowering the median just because of their selection. So I will leave it at that. I -- you know -- we don't have too much time and I don't want to impose on your time, and I appreciate that you have given me and the other shareholders the opportunity to speak. So do you have any questions for me on this topic?

THE COURT: No.

MR. MANOUSIOUTHAKIS: Thank you very much. So I want to kind of make a summary statement, if you will. I have gone through a document that was prepared by Mr. Kevin Lewis, the legislative attorney of the Congressional Research Service, called "Bankruptcy Basics, a Primer."

It's dated March 22, 2018, and it (indiscernible) for me. I'm kind of learning about all of this in this process. "The U.S. bankruptcy law has two central aims, to relieve debtors of debt obligations and give them a fresh start, and preserve the interests of creditors and other stakeholders."

That is an important statement included in this document. And it then says that, "Ideally, a Chapter 11 plan is a product of negotiation between the debtor and its key stakeholders that are judged with rights and obligations among the debtor and his debt and equity holders so as to render the reorganized debtor a viable economic entity."

In this bankruptcy there was no negotiation with equity holders that took place before the proposed plan was put forward. The second point I want to make is that in this bankruptcy the company shareholders did not vote on the plan before the bankruptcy filing, before the filing.

Now, I want to make some general statements, because unfortunately, I am personally being affected by all of this, but also, I think there are many, many, many other people in the country. Of this society, we're explaining things, this pandemic of COVID-19, but we're also experiencing the pandemic of public company bankruptcies that are unnecessary.

They are bankruptcies by choice and we essentially have very large financial organizations with access to extensive legal resources and access to restructuring

bankruptcy so-called professionals that are overwhelmingly hired, as we have established, most of the time by debtors and creditors.

And what is happening as a result is we're experiencing now a very perverse consummation of what was expected to be an adversarial relation between the debtors and the creditors into an effectively collaborative relation.

They are well-armed with legal representation, and they seem to just come and goes. And this come and goes seem to be to shortchange the interest of the other stakeholders, and mostly retail equity shareholders that typically cannot afford any legal representation. I may want to give as a simple piece of evidence how many members of the legal team represent the shareholders versus the debtors and the creditors in these proceeding.

I believe that throughout our argument, the shareholders, we have established that VIVUS is not insolvent. It has three drugs that are approved, marketed, and licensed in multiple territories, in the U.S., in the E.U., and so on.

It has a promising drug in the research pipeline, and a telemedicine platform that at least in terms of a metric that is called number of physicians involved, it seems to at least be premised to be close to the metric used by Teledoc of 31 hundred physicians, and Teledoc has a 17 billion dollar capitalization in the marketplace.

Now we still have not heard -- if you remember, Mr. King said that he doesn't remember how many that they have involved in their model (indiscernible) that would be something --

THE COURT: Excuse me.

DR. MANOUSIOUTHAKIS: Yes.

THE COURT: Please, everyone, mute your phones. I'm hearing other conversations.

DR. MANOUSIOUTHAKIS: Okay?

THE COURT: Dr. Manousiouthakis, yes?

DR. MANOUSIOUTHAKIS: So I would still like the Court to receive that information from Mr. King. How many physicians are involved in the VIVUS telemedicine platform? That is an important consideration because even the telemedicine platform could show value that we haven't really talked much about.

THE COURT: It could --

DR. MANOUSIOUTHAKIS: Now --

THE COURT: It could, but the clear testimony on that, Mr. Manousiouthakis, was -- or, Doctor, I'm sorry, is that -- is that VIVUS's telemedicine platform is not the broad-ranging platform that other companies may have, but was -- is done as a way to increase prescriptions for Qsymia.

DR. MANOUSIOUTHAKIS: Well, I would agree with the concept that it is a very specialty oriented telemedicine platform, and I would like to put forward the point that this

is actually a tremendous advantage. I would make this simple analogy: When you go to your doctor, you first go to a generalist, but then if you have a special problem, you go to a specialist.

Well, the VIVUS platform is the specialist. The Teledoc would be the generalist, that is my point.

THE COURT: Thank you.

DR. MANOUSIOUTHAKIS: Now the issue regarding the NOLs, so Piper Sandler applied the debtors' NOLs to forecasted revenues, that means we're going forward. If you remember, I had made the point that NOLs can be also applied backwards, and can lead to tax refunds.

Now if we go to Mr. Pickering's testimony, he says there's no tax law that allows you to sell them into the market, so NOLs simply have no value. Now that seems somewhat inconsistent, but I will not focus too much on that. With his subsequent statement, where he says "NOLs can only be utilized by the reorganized company."

And then goes on, and he's using the expression, NPP. The NOLs would stay within the NPP. The use would be available, but only within the NPP, and so on. He's very careful in his wording, so I point that out.

These NOLs would only be useful in the NPP itself. What is that NPP? Which NPP is this? Is it VIVUS or is it IEH because VIVUS would be a subsidiary of IEH if this plan is

confirmed.

So I would go then to some recent -- some statements that can be found in the CPA Journal, Certified Public Accountant Journal, the rules of the profession, article Consolidation Group Tax Allocation Agreements, How to Handle Tax Attribute Carryovers. "A consolidated group's parent corporation acts as the group's agent in all federal income tax matters, Treasury Regulations Section 1.1502-77(a). In this role, the parent corporation pays the group's tax liability, receives its tax refunds, and interacts with the IRS on the group's behalf." That seems pretty clear to me that NOLs maybe worth hundreds of millions of dollars in this situation.

The IRS has released guidance recently in the context of the CARES Act, we're talking 2020, with expedited procedures for claiming refunds for five year net operating loss carrybacks. This is the IRS talking. So I think there's a lot of value in the NOLs, and both for VIVUS and IEH have -- having VIVUS as a subsidiary.

I will go on to the VIVUS valuation. I believe we have established that the VIVUS is in the several billion dollars category. I have given detailed numbers. I have not heard any counter arguments about the Obesity Act impact that is at the door. If one looks at the number of co-sponsors, we are at the threshold, just below the curve, number of, you know, sponsors as a function of time. We are almost there.

Now I have been a very long-term shareholder of VIVUS, pre-hostile takeover, pre-approvals of the, you know, Qsymia, STENDRA, and so on.

We have suffered a hostile takeover by First Manhattan. The argument was, well, we are destroy -- you know, the current management is destroying is shareholder value. Well, it was 285 at the time, and now we're at twenty. If that is not destruction of shareholder value, I don't know what is.

This was, over time, a company with extremely high levels of (indiscernible) throughout the same period. Then we have the sale of STENDRA. We also have the continued set of management changes. We have a company that has changed CEOs over a seven-, eight-year period like several times, four or five. I cannot even count anymore.

How can you give stability and so on if this is happening? There's something going on.

So we have the sale of STENDRA happening for 30 million in future consideration, supposedly to start increasing sales of STENDRA to Auxilium. Well, Auxilium is a small company itself, how's it going to sell STENDRA? If -- I understand if you sell it to Merck or to Pfizer and so on, they get these enormous sales forces, that's understandable. If you sell it to Auxilium, a tiny little company, and guess what happens after you got your 30 million and your future consideration? One year later, Auxilium is sold for 2.6

billion dollars.

And if you look at the sale, you know, papers, it features STENDRA as one of its two prize assets, XIAFLEX and STENDRA.

Then we have the 135 million dollar purchase of PANCREAZE. We have established that it -- at the rate it generates revenue, it would recover just its acquisition cost in like seven years or six years or something like that.

But more importantly, what it did is it took 135 million dollars out of the cash reserves of VIVUS. Would we be talking about the VIVUS bankruptcy here now if we have 135 million in cash in the bank at VIVUS? No, we wouldn't be.

So we are having this situation essentially come up because of all of these decisions.

Now I believe that the Court should reject the proposed Chapter 11 plan proposed by the debtors and the creditors, and should consider other plans that are put forward by the shareholders, and there can be many. There are many, many ways to go forward where everybody can win, not just one subset of the parties involved.

One such plan that I want to put forward is that the bankruptcy application is rejected, the stock of VIVUS is refloated into the NASDAQ, there's some replacement of some members of the VIVUS board with members representing shareholders.

And then, considered strategic alternatives that somehow Piper didn't come up with, or never told us that it could come up with it. We know they were working since 2019 with VIVUS supposedly on strategic alternatives. One recommendation I have made was a possible company splitting, or a creation of a subsidiary and a spinoff that would, you know, be possibly attracting a much higher capitalization value, or the issuance of a tracking stock. A tracking stock is a company that says I have multiple businesses -- VIVUS does, it has drugs, it has Qsymia, it has STENDRA, and it has PANCREAZE. It could say who wants to only participate in Qsymia? Here's a tracking stock for Qsymia only. Who wants to participate only in STENDRA? Here's the tracking stock for STENDRA. It's a natural.

And then because the debt stays with the parent company, these things could develop their own much higher capitalization. It's -- it's something that, you know, IEH should be familiar with because Dell and Vmware have exactly done that, and Vmware now is a tracking stock for Dell, and it is a much, much higher capitalization.

So these strategic alternatives will dramatically increase the market capitalization of VIVUS. And it will enable easier IEH debt financing.

Now what needs to be done for that is you can have essentially the Court, you know, in order to create value for

all the stakeholders, put forward and obtain the consent of IEH to extend the time period that they provided to VIVUS for paying off its debt on June 2. That time period they had provided was one month only.

The Court could put forward the notion to IEH that you should extend this period to 13 months because that will allow mainly to finish on July 1, 2021.

What that will allow is a much easier access to the financial markets, not under the Damoclean Sword of you have to do a deal in one month. You have 13 months to make a deal, finance and so on. The markets -- you know, the associated (indiscernible) of the markets will be much less in terms of access to capital.

And also, most importantly, it will give the ability to VIVUS to complete the so-called 10-quarter turnaround time that they have been saying for months -- for months in quarters to the investors that we have a 10-quarter turnaround plan to make VIVUS profitable and to deal with our debt, and so on. Why not make that happen? Let them complete the 10-quarter turnaround plan. What is -- you know, I'm not saying that they should not have some interest in some financial, you know, accommodation for extending this. But we're not talking about years, we're talking about one year. Why isn't that possible? That's my recommendation, so that everybody can win in this situation.

Thank you.

THE COURT: Thank you.

Mr. Makosky?

MR. MAKOSKY: Yes, this is Bruce Makosky here, Judge Silverstein, how are you today?

THE COURT: Well.

MR. MAKOSKY: Can the --

THE COURT: Thank you.

MR. MAKOSKY: Can -- oh, good. Okay. Can -- can the Court hear me all right?

THE COURT: I can.

MR. MAKOSKY: Okay, very good.

I should mention that there have been a number of thunderstorms going through this area, and my power went off briefly about an hour ago. So if I disappear all of a sudden, that will be the reason.

Thank you, Your Honor. There's been a lot of discussion and a lot of testimony certainly over the last three sessions of this combined hearing from last week.

What I'd like to do is briefly summarize what I perceive to be some of the key takeaway points from the last few days. And I'd like to start with the Dr. Ahmadi testimony.

On Wednesday, I called Dr. Reza Ahmadi to the stand to provide an alternative valuation for VIVUS, and I just would like to remind briefly the main points that he made were, first

of all, that the Piper Sandler analysis is not independent. It does not provide adequate and specific quantitative support for the assessment of the VIVUS assets.

And secondly, that the analysis does not assign any value of the VI-0106 drug for which successful Phase 1. Trial results have been announced for over a year, and they're in Phase 2.

And the third point here was that the analysis does not assign any value to the VIVUS net operating losses, which are over 900 million dollars.

And the comments I wanted to make were that while the witness may not have had every single detail 100 percent correct, the main gist of his testimony should be considered to be valid due to the following:

He felt strongly enough to come forward and have his letter submitted to the Court. He did so without any sort of financial remuneration whatsoever. And he made himself available not only for the Court appearance itself, but also for a two-hour deposition prior to the Court appearance, as requested by the opposing counsel.

And as a professor at the UCLA Anderson School of Management who teaches MBA students, he ought to have enough real world knowledge to be able to provide an independent alternative opinion on the valuation.

In terms of the valuation analyses officer by Ms.

Stratton and Mr. Pickering, there is substantial doubt that the assets of VIVUS have been valued correctly. Most notably, no value whatsoever is given to the pipeline drug VI-0106, contrary to how biopharm investments are normally valued, which does take the pipeline into account.

The only market task provided by Ms. Stratton was when Mr. Slabin -- Chlavin, I'm sorry, offered one million dollars to purchase this asset, VI-0106, the debtor and debtor in possession continued to claim that it has no value, but yet it was not part of their gift to shareholders in the existing stockholder settlement plan, implying that their actual belief could be that it must have more value.

We also heard from Mr. King the other day that PANCREAZE was an excellent acquisition for VIVUS when it was purchased from Janssen Pharmaceutical for 135 million dollars years ago. But now for some reason, it is being valued at anywhere from only just 15 million dollars maximum all the way down to zero in the valuation provided by Mr. Pickering even though the annual run rate of sales is greater than 20 million dollars.

By purchasing this asset, VIVUS used a substantial amount of cash which it had held on the balance sheet, cash that could have been used to pay down the convertible debt owed to IEH Biopharma in May of this year.

They also took out senior secured debt due in 2024 at

a much higher interest rate.

In November, 2018, John Amos, the CEO, announced they would be paying off roughly 49 million dollars of that senior secured debt because they had too much cash on the balance sheet. Their collateral situation had improved substantially, and it would also be saving 10 million dollars over the next four years in interest payments. Investors were led to believe, therefore, that the company turnaround was progressing so much so, in fact, that they had enough confidence to pay down the 2024 debt early. And so they certainly must have had a plan for addressing the 170 million dollars coming due to IEH Biopharma in just the next six months.

However, we heard Mr. King say twice, once at the equity committee motion hearing, and also again on Thursday last week, that the real reason this debt was paid down early was because PANCREAZE sales were below target, and they were, as a result, in breach of a debt covenant with Imperial Capital, and thus were obligated to pay this debt down early.

Mr. King said that this huge disparity in the reasons given is due to CEO John Amos optimism or embellishment. But, in fact, the explanations are as different as night is from day when compared with the reason given to the shareholders.

How exactly does a company's collateral situation improve while, at the same time, they are in breach of covenant due to missing the sales target? The company has a fiduciary

duty to accurately convey all material events which occur to the stockholders.

Mr. Cheng -- oh, sorry. Mr. King claimed to be executing his fiduciary duty, but was actually not even directly involved in the bankruptcy negotiations. Nor was he involved apparently with the June 19, 2020 presentation in which management stated that VIVUS could generate up to 180 billion dollars per annum for each of the next three years. That presentation was released just 18 days prior to the Chapter 11 filing.

Mr. King also says that he was brought in by the original founders of VIVUS to reignite the company in 2017, but does not personally own any shares of the VIVUS stock.

We later heard that he was brought in by CFO Mark Oki based on their relationship at Alexa Pharmaceuticals, another company, by the way, in which shareholders had their original investment transformed into a contingency value right.

The one person who could shed some real light on what was going on, CEO John Amos, was not made available to testify at this hearing.

Lastly, regarding the NOLs, even after all of the proceeding testimony, it is still unclear to me exactly with precision how much they are really worth. But given the different federal and state tax rates, most likely somewhere between 100 million and 200 million dollars. In laymen's terms

for me, that might be best described as a lot of money.

In Ms. Stratton's testimony, however, this value may only be accounted for in the discounted cash flow analysis, and is certainly minimized in terms of dollar amount usefulness and importance.

In Mr. King's testimony, on the other hand, the NOLs are described as having a lot of value to the icon group, and was a major reason behind the successful negotiation of the restructuring support agreement.

Also, they are given as a reason why the company never raised equity previously, because they did not want to, quote/unquote, "blow up" the value of the NOLs to IEH Biopharma where, during all of this consideration for IEH Biopharma was the fiduciary duty to protect shareholders?

That concludes my argument, and I would, if permitted, like to make a closing statement at the end.

Thank you very much.

THE COURT: Mr. Makosky, you can make that statement now. This is argument, so you can make whatever closing statements you have now. I'm not sure I'm going to get back to you.

MR. MAKOSKY: Okay. Yeah, I wasn't sure if we went another round or not, so that's -- that's why I brought it up. Okay, then --

THE COURT: I appreciate it.

MR. MAKOSKY: Okay, terrific.

Then in that case, Judge Silverstein and the Court, I want to thank the Court for the opportunity to argue my case here today, and also to bring forward the witness last Wednesday. I believe it has been shown at this hearing, not only that the assets are undervalued, but also that there is substantial doubt regarding a potential conflict of interest and possible breach of fiduciary duty associated with this bankruptcy.

I am just a small shareholder, but I feel this case has wider implications for the markets as a whole. If it's some kind of a new paradigm that private equity or hedge funds or whatnot are able to take companies under using only debt, then I believe that's going to put a huge chill on the equity markets.

Now please don't get me wrong, as a shareholder, I have no problem accepting responsibility for my investments. If a company I invest in is acquired at a discount to what I may feel it is actually worth, I might not be happy about it, but it would still be fair in my mind.

Likewise, if a company fails because they have poor products or cannot execute their business plan, then I have to accept the risk I took and move on.

But, however, if the company is somehow set up to fail, or the assets are all rolled up somehow while

shareholders are simultaneously wiped out, then that is absolutely unacceptable because it means that anyone who bought shares in VIVUS after the FMC takeover in 2013 would have had zero chance of any other outcome than losing all of their investment in the company.

Now how is that a level playing field and how is that fair? My father always taught me that I should invest my money in the United States for two main reasons:

First of all, the U.S. is governed by the rule of law;

And secondly, the markets are transparent and fair.

I'm afraid I've seen a lot of changes happening in the States in recent years, many not for the better. While I'm not here today to make a political statement, I do believe it is important to stand up for what is right; I do not see how confirmation of this bankruptcy can be right.

Nevertheless, I still do believe in justice in America. I humbly request, Judge Silverstein, that you reflect on the facts presented in this case, and agree that confirmation of this VIVUS bankruptcy plan currently before the Court should be denied.

I, therefore, ask you to sustain my objection and the objections of the other objecting party to confirmation of the plan.

Now let me close by saying that I sincerely

appreciate the opportunity to present my case before the Court, and for the latitude shown by all parties to myself as pro se in this case.

Thank you very much.

THE COURT: Thank you, Mr. Makosky.

Mr. Dijkstra?

MR. DIJKSTRA: Good afternoon, Your Honor. Good morning to me, it's 5:35 in the morning, so I hope I'm going to make it. It's just a short statement, it's not really an argument.

So, nevertheless, if you have any questions, then I'd gladly hear them.

Smothered with the COVID-19 hot sauce, the prepackaged pan was presented to us as a Happy Meal takeout, and please do not forget to leave your rights at the door. When it turned out not to be the expected walk in the park, suddenly it became the fault of the four objecting shareholders, keeping the noteholder, debtor, its employees, and all the other shareholders hostage.

Now I'm not sure if it is common practice in this line of work, but all that was given to us until August 18 were low points, mid points and high points, plus the conclusion that the company was clearly insolvent based on the art of valuation.

But even when the calculations finally came, I

personally just could not get away from the feeling that it was made to match the numbers in the disclosure and not the other way around.

The thing that surprised me the most is that we were only given the opportunity to speak to an (indiscernible) lawyers and specialists was just member of the VIVUS board. Why was the management so often subject of discussion and definitely cause of a few contradictions not available to us? (indiscernible) value from an insolvent company and to seemingly unimportant studies at a university out of sight. Now does that not sound just like everyday life? But what happens to when you marry the two together? That, Your Honor, only God and King seemed to know.

I do not wish to be in Your Honor's shoes today having to distinguish between what is fact, fiction, or confidential. But in line of my Docket 206 proposal, perhaps the shareholders can be of great help. Through this case, I learned that the basic principle of the bankruptcy laws is to give companies a fresh start.

I am convinced that such results, as presented in the plan, can never be achieved. Debtor, with the same management and challenge products, will just be forced on a continued path of indebting itself. Debtor insists that just for the deeply trouble VI-0106 (indiscernible) formulation and stability arise, at least 40 million is needed for further clinical

development, and that's against a highly speculative outcome.

When I add that to the five million pro rata placed as debt by Piper Sandler, and the 35 million paid out under the CVR, the total sum comes to 80 million dollars.

Now if the shareholders are given the opportunity to relieve the debtor from the burden of carrying forward some of their worthless assets in exchange, the total sum of 80 million dollars will be contributed to the positive side of debtors' balance sheet.

This means that over time, debtor only needed a net exit facility of just 10 million dollars.

Now going from 270 million dollars in debt on the petition date, to just 10 million in time, that, I believe, Your Honor, is a real fresh start.

Dear Judge Silverstein, I sincerely thank you for both giving me and the other shareholders the almost unlimited opportunity to present our case and its evidence. Your Honor, we are forever in your convertible debt.

Thank you.

THE COURT: Thank you, Mr. Dijkstra.

Okay. Mr. Morgan, I will give you the opportunity to have the last word since this is your confirmation hearing to respond to anything that has been raised by any of the objectors.

MR. MORGAN: Your Honor --

MS. CASEY: Excuse me, Your Honor.

MR. MORGAN: Your Honor --

THE COURT: Oops.

MS. CASEY: This is Linda Casey from the United States Trustee, did you want to hear --

THE COURT: Oh, my -- my sincere apologies, Ms. Casey; yes.

MS. CASEY: That's okay. I don't show up on your screen, and I do thank you, again, for allowing me to appear without showing up on your screen, so thank you.

For the record, this is Linda Casey on behalf of the United States Trustee.

Your Honor, we have a handful of objections that are all connected in some way. So we do object to the condition of the existing stock element that shareholders are prevented from bringing objections regarding the cash collateral, the plan, the RSA or the exit facility to Your Honor's attention.

We object to the third party releases being granted by unimpaired creditors.

We object to the third party releases being granted by existing stockholders.

We object to existing stockholders having to release claims based on intentional fraud, gross negligence, recklessness, and willful misconduct.

And we also object to the third party releases being

granted in favor of the debtors' officers and directors, employees, and professionals.

And finally, we have some concerns related to the code solicitation communications by Stretto.

As I indicated, these are all connected in some way, and they're connected by the consistencies that you have heard the U.S. Trustee raise several times that third party releases cannot be based on alleged deemed consent where silence is the overt act of acceptance.

In this case, we have some unique facts in the record and in the case that really highlights the issues that the U.S. Trustee has with these releases.

So first we have some of the facts on some of Stretto's representatives testimony that we don't usually have in these cases. And while I had discussed with debtors' counsel prior to the hearing the statement that Mr. Morgan read in, Stretto's representative actually testified to more than what I would -- that my understanding of the facts were.

And what he testified to was that Stretto had received calls from shareholders confused as to what they were supposed to do, how they were supposed to opt out, or how they were supposed to remain opted in.

We also heard testimony that if a creditor actually sent back the opt out form, and signed it, and filled it out, but failed to check the box that they had opted out, there was

an assumption that they were asserting that they actually wanted to opt in, and that they were confused, and had to send back this form in order to do so. And that unlike those who opted out, those who sent back the forms and signed them, but did not check the opt in/opt out box, Stretto did not call to confirm that that's actually what they meant to do.

And, quite frankly, that's consistent with the order, and that's consistent with the process, is that if the box isn't checked, sending back the form is insufficient, and we don't know how many people just simply mistakened to check that box.

We actually heard -- and I believe it was Mr. Dijkstra -- in his questioning that his mother had intended to opt out, and failed to check that box, and was originally put in as having checked in.

We also, of course, heard of communications with the parties who have opted out, and Stretto, I will discuss at the end, what I believe should happen to that if Your Honor otherwise confirms the plan. Just as a little aside, I want to say that I'm not casting any aspersions on Stretto or the debtors' other professionals, and I do understand there was a legitimate need to reach out to get the nominee information, and I believe that the contacts were made in good faith, despite the fact that I do think that they were potentially confusing and need to be addressed.

So I think Your Honor has said, and I think the parties understand, and I agree, that even if the plan is otherwise confirmable, these releases are not necessary to the reorganization. And they would not pass muster a non-consensual release basis. If a plan is confirmable, the debtors necessarily have to prove that equity was out of money, and that they could have crammed down a plan with no payment to equity at all.

So what are these third party releases? Well, they're basically an offer of a settlement to existing stockholders, and were extending the silence can be deemed consent from third party releases to actual complicated settlement offers that have terms beyond just the third party releases. Here the stockholders are being told we'll give you this payment in exchange for not just giving the third party release, but also agreeing to all of the existing stock settlement conditions, which includes not objecting to the plan, which includes -- let me switch to that screen real quick -- which includes not opting out of the releases, not asserting a subordinated claim against the debtors, or the officers, or directors, not selling, or transferring, or otherwise disposing of their claim after the petition date, and not paying back any recovery or payments received on account of their interest, other than as set forth in the plan.

So it's not just a release, as we see in other cases.

It's an actual offer of the settlement that we are assuming is being accepted simply by silence.

So to go back to the issue of the deemed silence for releases. That extends to both the releases by the unimpaired creditors and the existing stockholders. And the debtors have taken the position that basically because it's in a plan, it's within the jurisdiction of the Court and, therefore, silence -- there is a duty to speak up, and silence can be considered acceptance. Well, we've seen how difficult it is for the existing stockholders in this case to understand what this is, and that's one of the reasons the U.S. Trustee has always objected to that.

But here, we see that both as to the existing stockholders and the unimpaired creditors, what is being granted is a claim held by a third party against a third party. It is not property of the estate, it is not something that this Court has jurisdiction over.

As to the unimpaired creditors, the proposition is that they have received consideration for those releases because they're being paid in full. Well, of course, they're being paid in full because under the Absolute Priority Rule, they need to be paid in full to confirm this plan, and they're being paid by the debtors.

The releases, however, are broader than just the claim that the unimpaired creditors can assert against the

debtors. The releases are to any claims related to the debtors. And importantly, any claims related to the relationship between the debtors and the released party, not the releasing party. And there are several examples of where this could come in, and it could be a claim that they have not been paid on, and they have not received consideration directly from the released party.

Two of the ones that we have thought of at the U.S. Trustee's Office, the first one would be if a employee of the debtors were to go to a mediation at the lender's or at the shareholders', whomever is the released party, and got injured, even though they got paid in full on their worker's comp against the debtors, worker's comp is limited, and they may have a claim for additional damages that they could not assert against the debtors against those third parties. And because this release is so broad in any way related to the debtors, in any way related to the relationship between the debtors and the released parties, that would extend to them. And that goes to the silence is being deemed consent, and the understanding of what's happening here. Unimpaired creditors hear that they're going to get paid in full, and we're putting a duty on them to read these complicated legal documents that can be hundreds of pages long, that they are not bankruptcy professionals, to understand these fine points as to whether this is a broader release, and that they are actually giving up something other

than what they're getting paid for.

The other example, I don't think it's relevant here, although I haven't looked at that carefully as to what's being rejected, is an unimpaired creditor received payment in full on its rejection damage claim as limited by the Bankruptcy Code for a nonresidential lease, but has a guarantee by one of the released parties, although they've been paid in full under the plan, they've been paid a limited amount of their claim, and they would be releasing these third parties for additional amounts simply by being silent, and not understanding that they needed to object.

The third party releases is for the existing stockholders, perhaps in this case I would say is even more problematic because they -- this is all of their claims, and they are -- we have testimony in the record that stockholders were confused as to how to go about opting out or opting in. We have evidence in the record that some people attempted to opt out, and didn't do it appropriately.

And that just goes to the theme that the U.S. Trustee has. We have -- I mean theoretically if the ability to force a release or deem or consent because they have not objected or sent in an opt out notice is appropriate, that would even extend to people who have only received constructive notice. And it's hard to imagine how the party who is an unknown creditor or a known creditor who the debtors cannot locate has

affirmatively indicated that they consent to the releases if they're only getting publication notice that the may or may not have read, and they certainly haven't been served with all of the papers.

So those are -- you know, they're the consistencies. I know Your Honor has heard the U.S. Trustee's arguments on third party releases in the past. We just think that this case shows those reasons why we are concerned about that in this case.

As to the objections, the limitation on being able to object, Your Honor, it's both improper, per se, but it's also overbroad. You know, such that a shareholder would be ineligible to receive the treatment under the plan or under the existing stock settlement, I guess is more appropriate, even if they brought an objection to Your Honor's attention that was not a -- you know, perhaps a objection to the cash collateral, that they have a lien, that that was being primed or objection to the plan that the notice was unclear and that they objected to the disclosure statement because they didn't understand how to opt in or opt out is, you know, to -- while we understand the debtors' position is this is just a settlement, and a settlement offer, and they could reject it, and then they could object.

The U.S. Trustee's position is there should be some guardrails on what the settlement offer can provide. And is it

appropriate to silence stockholders, and not let them bring to Your Honor's attention issues with -- you know, any issue at all with any of these major pleadings in the case.

We also do object to the relief given by the shareholders to have to include intentional fraud, gross negligence, recklessness, and willful misconduct. And it is somewhat tied to the fact that this is not truly consensual. If this were a negotiated agreement where the parties were in the room, and there was back and forth, and they hammered it out, you know, the U.S. Trustee doesn't usually typically object to the terms between two parties that are sophisticated and have come to an agreement unless it affects some other rights.

But that's not what happened here, this is a take it or leave it offer. And we don't typically see that broad of a release imposed upon third parties, especially third parties who are stuck in a position where they have to decide, well, I really am fine with the treatment, but I really don't want to give up intentional fraud, gross negligence, recklessness, or willful misconduct, but I don't have a choice.

And finally as to the releases. The case law is clear that the third party releases are not to be granted to officers and directors, employees and professionals. They have not provided any contribution to the releasing parties. And the case law is clear that performing their jobs and their

duties is not sufficient. Officers and directors and professionals are entitled to exculpation, not to releases.

Now I know the debtors are going to say that this is the best possible result, and that if Your Honor is to deny confirmation, or at least deny the existing stock settlement and the third party releases, that the shareholders are going to get nothing. Well, that may be the end result, I don't believe that Your Honor can excise the existing stock settlement from this plan and confirm it, especially given the fact that the shareholders who opted in did not object on that basis.

So it would need to be at least re-noticed with the existing stock settlement taken out, if not renegotiated in full. And additional parties could come forward with additional objections and, you know, we'll see what happens.

But the third party releases are just not appropriate in this case and are very problematic.

Now if Your Honor were to approve the plan and the releases, we do have some concerns with the post solicitation communications by Stretto.

Again, not to cast aspersions, I understand why they did it. But if you look at the -- you know, we obviously don't know what was said in the phone call, but we do have the email. And when we look at the email that was sent, it was very briefly said if you opt back in, you're giving your

releases under Section 10.7, but there was no real notice -- statement as to what that meant. And in the bold type, it said, "and if you keep your opt in, you're giving the $2.58 distribution." And there was a discussion, again, of what that was and the fact that the -- I forget what the numbers is -- is going to be paid immediately, and then there is a contingency on the two dollars, and it's not going to be paid for two weeks.

And I just think that as Your Honor noted, the notice was heavily vetted and negotiated, and specifically there was a box with very detailed information that a layperson could understand, explaining what the releases were, who the releases were being granted by, who the releases were going to, what your -- payment you were going to get in exchange for what the contingency's for, was the two dollars. And having read all of that, the 45 or so executive stockholders chose to opt in, and then getting either a phone call or an email where the only emphasis is on what you're going to get paid, and not a explanation of what you're going to lose if you take that offer; we had 45 come back in.

The email also was a little confusing. I think I understand how it came about, but the email that went out to the parties who they could not reach on the phone said confirm that you want to revoke, or fill out this paperwork. And I think that came about because if they talked to somebody on the

phone, they got the oral indication they wanted to revoke, and then they sent an email that said confirm our conversation where you want to revoke. But the email that went out to the parties who weren't on the phone to say confirm that you want to revoke is a little confusing. And, quite frankly, I don't have confidence if somebody didn't write back and say, "I confirm." Meaning I confirm that I want to opt out, but -- because it's unusual to say I want to confirm that I want to revoke.

So I do -- we do think that there should probably be -- if Your Honor were to confirm the plan otherwise -- a process to re-notice, maybe simply send something similar to the boxed language that we had before, but it should be vetted, the parties should discuss it, and there should be another round to make sure everybody was clear on this. We do have testimony that creditors who may or may not have opted in or opted out called Stretto and said they were confused. We have this confusing process of trying to find out if people really wanted to opt in or if they wanted to revoke their opt in -- excuse me -- opt out -- see, I'm even being confused. And I think that it should be cleaned up through a process that is vetted and approved, and a notification going out and giving everybody a second bite at the apple.

And unless Your Honor has any further questions, that's the U.S. Trustee's position.

THE COURT: Thank you.

Is there anyone else who's objected that I have overlooked?

MR. PINKAS: Your Honor, Oscar Pinkas here for IEH. No objection you overlooked, but we also would like to be heard.

THE COURT: Okay, Mr. Pinkas.

MR. PINKAS: Thank you, Your Honor.

We appreciate the Court taking the time for this hearing with a busy schedule. As Your Honor might imagine, we join in the debtors' legal arguments, and rely heavily on argument in their papers in support of everything that's before the Court. We believe they addressed the vast majority of the points at issue.

We also join in the arguments regarding credibility and admissibility and motions to strike regarding evidence.

Regarding the last point, Your Honor, just to take in reverse order for a moment, the U.S. Trustee's concern about opt outs. If there's any concern that opt outs coming back in had any confusion, we're perfectly fine letting them choose whether to opt out again post effective date.

As Your Honor recalls from the Equity Committee hearing, I gave you the example of a class action settlement where you return the card. We're not trying to take anything away from people, so if they want a second bite at the apple of

opting in, we have no problem with that.

There are two primary issues before the Court, Your Honor: valuation and third party releases. Before addressing them in detail, I wanted to note what's not evident from the record.

The debtors have thousands of creditors, three of them objected to what were contractual assumption issues; all three have been resolved. So as we stand here today, there's not a single creditor that takes issue with the plan.

In addition, as you saw in the Stretto declaration, the debtors have over 10,000 shareholders. We have four before the Court and 106 total that opted out. So the debtors have over 10,000 shareholders, about 99 percent of their -- point nine actually of their equity interest that take no issue with confirmation.

Turning to the issues, regarding the releases, they meet all the applicable legal standards as I'll describe later.

On valuation, it is the debtors' burden to prove insolvency by preponderance of the credible evidence, that's the Emerge Energy Services decision by Judge Owens, 2019 Westlaw 7634308 at Page 6.

The only credible evidence, Your Honor, before the Court on valuation is Ms. Stratton's expert testimony. And that analysis was both reasonable and used the three methods that are generally accepted by the courts in this District.

That's the Nelson Neutraceutical decision, 2007 Westlaw 201134 at Page 20, it's a Judge Sontchi decision.

Ms. Stratton testified multiple times, Your Honor, that VI-0106 and NOLs were both included in her valuation. And her method of inclusion comports with valuation theory and with the law. Again, the Nelson Neutraceutical decision on methodology and the Spansion and Ampex decisions that we cited in our brief on value a speculative asset at zero dollars.

The major dispute then that -- what we have, Your Honor, is whether or not the debtors are insolvent. Again, the credible evidence in the record belongs to the debtors.

But perhaps most importantly, Your Honor, no matter what type of analysis you use, the answer is the same. The debtors have undisputed claims of 271 million dollars. The valuation on June 20th, valuation on August 11th, a market test, enterprise value as -- was calculated in part of Piper Sandler's valuation, they all come in between 197 and 230. So they're all about 20 percent or more -- and we would say or more -- less than valuation. And that includes, Your Honor, as you speculated, whether we could assign some value to 0106 based upon a risk adjusted analysis.

The debtors paid one million plus 39 of contingent payments. We heard testimony that 0106 has not changed since 2017. So at most, we can value that 39 million of deferred payments.

If you look at the 13 risk factors that were clearly delineated in the debtors' SEC filing, at most, you could give them a generous chance of overcoming each of the 13. But even if you say 15 percent, that's still only 16 million dollars -- excuse me -- 6 million dollars. So the value impact of 0106 under any standard is immaterial.

THE COURT: But what do I do -- and I'll give you a chance to answer it because, quite frankly, this is the elephant in the room.

MR. PINKAS: Um-hum.

THE COURT: Ms. Stratton's valuation is as good as her assumptions and as the projections on which they are based.

MR. PINKAS: Um-hum.

THE COURT: And I had no testimony from management with respect to contemporaneous, in essence statements they made, that don't line up with the projections.

MR. PINKAS: I'm glad you asked that, Your Honor, because I -- as you might imagine, that was part of what I was intending to discuss with you.

THE COURT: Well, it's 7 o'clock and I'm trying to move us to the important -- what I think are the -- I'm telling you, this is where I have issues with the -- I don't know if they're issues yet, but this is what I see as a deficiency or possible deficiency in the evidence that was presented to me by the debtors.

MR. PINKAS: Understood.

Your Honor, the presentation is part of an S-1 filing. S-1 filings are for stock issuances. They relate solely to forward-looking statements.

THE COURT: So why isn't the management in front of me telling me all of this?

MR. PINKAS: Your Honor, I don't know why the debtors did not put a management representative on the stand, but my -- my -- what I would like to articulate is the fact that I don't think it's material.

The law is that any statements on going forward that are not projections, in fact -- the presentation specifically says it's not making projections of a business. The law says those statements are immaterial and cannot be relied upon --

THE COURT: So at the same time --

MR. PINKAS: -- and that is --

THE COURT: So at the same time that the debtor is contemplating wiping out equity, it could make statements that suggest that one of the assets that it values at zero is, in fact, worth a lot more than that. That's acceptable?

MR. PINKAS: Your Honor, I'm not here to judge whether it's acceptable or not, that's Your Honor's position.

But what I know is that the law says that that is permitted, and that is --

THE COURT: Well, I don't understand that. So the

law says that I'm not allowed to consider in a confirmation hearing contemporaneous, in essence, statements of management with respect to the timeline on which they're going to develop a drug and the value -- and I'll use that in a very loose term -- that they place on it?

MR. PINKAS: No, Your Honor, I'm saying just the opposite. I'm saying that Your Honor is absolutely permitted to consider it, but that the law says it has very little to no weight, and that is the bespeaks caution doctrine, which says that those statements are immaterial as a matter of law, that's the Cross Media Marketing Corp. Securities Litigation decision, 314 F. Supp. 2d 256 at 266.

THE COURT: Give me that again. 314 --

MR. PINKAS: Excuse me, Your Honor; let me repeat it. 314 F. Supp. 2d 256, Pages 266 to 268. It says that the market participants investing cannot rely upon it, and also that preexisting shareholders cannot rely upon it because doing so would be unreasonable.

THE COURT: Well, okay, they can't rely upon it, but does that mean that the statements can't be true? What does that mean? They can't rely on it. I'm not relying on it, I'm just saying this is a statement management made.

MR. PINKAS: Understood, Your Honor. And I'm not -- and I'm not suggesting that they can't be true because obviously the SEC has material misrepresentation provisions in

its regulations.

But what you see in the statements is that they can project up to a certain amount of revenue. And so anywhere between one dollar and 750 million, that's not a material misrepresentation.

And lastly, Your Honor, the law also says -- and this is the Chelsea Therapeutics International Limited Stockholders Litigation, that's 2016 Westlaw 3044721 at Page 5 and 6, this is the Delaware Chancery Court, 2016. It says that any existing shareholder can't rely upon it, again, because to do so would be immaterial, number one. So it's immaterial to anyone, and it's unreasonable.

And there, the court dismissed the complaint where the company in which shareholders invested was undervalued -- allegedly undervalued in a transaction where buyer's own projections of a drug that the company owned was not yet approved for use by the FDA to treat the specific condition alleged, and the court found no reliance could be put thereon. Because, number one, the information is immaterial congruent with the other decisions. And in addition, the statements were clear puffery.

So from that perspective, Your Honor, I'm not suggesting you can't consider it.

What I'm suggesting is when you look at the confluence of factors around it, which is what the case law

says, including all of the debtors' SEC filings, it was 100 percent clear that it was a sales pitch for an equity offering. No more, no less.

And, Your Honor, the equity investors didn't believe it. Had they -- had it been true, had it been -- had it been actionable in the current -- you know, couple future years, potential investors would have invested in this business, we would have been paid our 235 million dollars, and we wouldn't be talking here today.

So I'm not suggesting management can make a misrepresentation, I'm suggesting they didn't. They tried to sell the product that they could not develop for three years and nobody put value in their assertion, that's what I'm saying to Your Honor, including the last sale, which was 40 million. If you bought something for 40 million and you haven't changed it in three years, why is it going to do better when you haven't even come up with a proprietary formulation or any proof that it's safe whatsoever, right.

And Your Honor speaks of elephants in the room, so let me address them for you because I agree with you there are elephants in the room and one of the things that we should address is what are they.

The debtors did try to finance or partner in the development of 106. If you have no possibility of developing something and nobody is willing to fund the development with

you, by definition it has no value. Okay.

The debtors did all they could to avoid bankruptcy. They spent three and a half years as you heard from two witnesses trying to find a way to repay their debt and IEH tried to help them for eight months. Unfortunately for everyone they were unable to do so, especially for us because as you heard at every pass for three years we just wanted to be repaid.

But the debtors didn't stop there, Your Honor. They, despite an inevitable bankruptcy, negotiated well, they used the levers they had, there's the possibility of business interruption caused by a non-consensual bankruptcy, okay. As Your Honor may be aware, commercialized pharma companies age poorly in bankruptcy.

The debtors used this lever to try and pull us into a plan. So, what did we do? We set out with them to formulate a contingency plan per their request, on a balance sheet restructuring to give them value presented, which is above their valuation, and avoid a non-consensual fight and deterioration of the business.

So here's where I'm going to demystify it for you, Your Honor. We're being accused of trying to steal VI-0106 or getting some enormous value from the debtors NOLs. I'm going to make it very plain and very clear. We agreed to support the plan above the debtors' value to minimize business interruption

and to close out the debtors' history on what we hoped would be a consensual basis.

Clearly, that was not going to be the case. But sitting here today, we are the only party entitled to recovery that's not being paid in full. We have secured debt that's being reinstated and we have convertible debt that is being equitized, and -- at what we believe is a high valuation. So the debtors are now paying 235 million of debt and we're being asked to take a $41 million haircut.

So, Your Honor, when presented with that, what do we do? As you might expect, we focused on how to preserve what the debtors have, their assets and how to close the chapter, releases. It's very simple, Your Honor. We would not pay people (indiscernible) rule would permit, only to have them make claims against a reorganized business, which is our only source of recovery, and this is not because the NOLs or 0106 have some great value. This is because we're not being repaid, and so we're forced to look at the debtors' assets to be repaid.

Had we been paid in full -- had we been paid in full, none of the debtors' assets would have any importance to us because we would have our capital back and we would go on about our way. But that doesn't mean that NOLs and 0106 -- some have some -- have some magical value. It just means that these are assets to which I am forced to get a recovery.

So, Your Honor, more evidence. Why could I not be stealing 0106? We've held the note since 2015. 10106 was bought in 2017. We clearly did not invest to own it.

On top of that, Your Honor, we are a lender. We don't run this business, we don't know how it operates, we didn't make any of the decisions and we don't have anymore information about these assets then Your Honor does having heard testimony.

So you can imagine 0106, we're not very optimistic about its value given what we've heard, especially if the debtors could not develop proprietary formulation or find a way to partner or fund its development for three years.

The same is true for the NOLS, Your Honor. The shareholders' fundamental premiss is totally incorrect. The debtors had no ability to issue any material equity without compromising their NOLs. So what did they do? They went to do a financing that would either pay off the debt in full, which means who cares whether the NOLs are impaired because you have a recapitalized business. They tried to do that and they failed.

So what other measures could the debtors have done? Issuing stock less then $235 million was not an option. Your Honor heard uncontroverted testimony that the debtors are three and a half percentage points away from a change of control. Issuing a hundred million of equity as Ms. Stratton testified,

is 90 percent of the company. So that would have changed -- that would have caused a change of control, it would have reduced the ability to use the NOLs, the debt still would not be repaid and the debtors -- and the shareholders would be arguing that they were diluted.

So, Your Honor, we were not somehow preferred in preserving the debtors' assets, especially the NOLs. The record is actually to the contrary, right. You try to sell 90 percent and when you can't, you preserve the asset you have so as not to impair current stakeholders, which is your fiduciary duty as a debtor, director and board member and officer.

So, from that perspective, again, Your Honor, we are a lender. We are looking at the same projections as the Court is from the outside. We are told that the reorganized debtors may have some profitability in the future years. We're relying on their projections and Ms. Stratton's valuation just are you.

So the NOL value is to offset that probability -- profitability, excuse me, which Ms. Stratton has included in her valuation. So then you ask me what is the relevance of the NOLs to IEH, it's very simple. We have not ascribed any valuation to the NOLs. Especially one more then in Ms. Stratton's analysis, right.

THE COURT: Well I don't have any evidence of that.

MR. PINKAS: (indiscernible) --

THE COURT: I don't have any evidence of how -- and

I'm not criticizing because I don't think this is IEH's responsibility to tell me how they value this company, but Mr. King on any number of occasions made statements that suggested that it was important to IEH to maintain the NOLs and that it did influence, to some degree, and I'll have to go back and look at the testimony, how they marketed.

You're suggesting that it only -- that the NOLs only matter to the company or that it was logical the way they progressed in their -- in the company's thinking on how to solve it's impending debt issue.

But I'm not -- I don't know that that was Mr. King's testimony. And --

MR. PINKAS: Your Honor -- excuse me. Sorry. I thought you were done.

THE COURT: And again, I'm not criticizing IEH. It's not your responsibility to come in and to provide testimony, but you can't give the evidence through what you're trying to say here because I don't have that.

MR. PINKAS: Your Honor, I'm not suggesting Your Honor has that necessarily directly in one sound bite but I think Your Honor does have that through Mr. King. He said that the NOLs were important in the negotiations as we were getting to consensus on a restructuring above the debtors' value, which means that what IEH told him is exactly what I told you, if we're going to support a plan above the debtors' value, we need

to be sure that the chapter is closed and that you're keeping all of your assets.

So I think Your Honor does have it, maybe not in one sound bite, but it is in Mr. King's testimony.

THE COURT: Okay, I'll look for that.

MR. PINKAS: Okay. Your Honor, just one point of clarification of the record, we were not involved in the proxy fight. I hope that's clear, but that proxy fight as you look in the SEC filings, was between FMC and First Manhattan, neither of them are IEH affiliates. The Mr. Demmy that was referred to had left an icon affiliated company 18 months before. We were not involved in the proxy fight.

Your Honor, I believe you should -- before getting into some of these points in detail, I think Your Honor should take judicial notice of the SEC filings. All the parties have referenced them or cited them somehow and they've not been moved into evidence. So if we're going to consider any public filings for the benefit of any party, they should be all considered for the benefit of all.

The law on what weight, which we submit is none, as I cited on the June 20th presentation, requires consideration actually, if you look at that -- those two cases I gave you, it says you have to look at the SEC filings that surrounded the statements so as to understand the disclosure that was at hand and here, the SEC filings, the 10-K specifically, said there

were 13 risk factors before 106 would generate a single dollar of revenue.

Your Honor, before addressing some further points where there was some questions in the record, let me address three points made by Mr. Demmy. The 1129 factors, Your Honor, Mr. Demmy could point to now 1129(a) factor that the debtors have not presented evidence on through testimony or an unobjected to portion of a declaration. We agree.

Mr. Demmy insinuates that the exclusion of the 106 product in the CVR, EBITDAR milestone is somehow to the shareholders' detriment. That's the first time I've heard that argument so I just wanted to point out to Your Honor that it's actually incorrect.

As you heard, there's a big difference between EBITDA and EBITDAR, that latter not accounting for research and development costs, which are high in this industry. The R&D cost difference between the CVR and the plan is actually not VI-0106. You heard Mr. King testify that the FDA has required a blood pressure study of Qsymia and that that is costing 16 and a half million dollars of research and development. So Mr. Demmy tried to insinuate that that 22 or so million dollar difference between the EBITDAR in the CVR and the EBITDA in the projections was the R&D for 106, the testimony is directly to the contrary.

Also --

THE COURT: I don't understand that so I want to understand that point because the EBITDAR in the contingent value rights agreement references specifically research and development expenses related to VI-0106. Presumably, research and development expenses related to other things are included in the EBITDA number.

MR. PINKAS: They are included in the EBITDAR number, not in the EBITDA, which is why the EBITDAR number is higher, right, because it's earnings before R&D so you're earnings are higher because R&D is not counted in EBITDAR.

And so, Your Honor, if you look at the two, there's about a 22 and a half million dollar difference, Mr. Demmy's point was that's all 106. It's not. You have testimony uncontroverted in the record that 16 and a half million dollars of that is actually Qsymia. So clearly that's not the difference maker here. V-106 (sic) --

THE COURT: Okay.

MR. PINKAS: I just want to clarify that.

THE COURT: I'll have to check. I'm not sure if I have any clear evidence in the record on that difference.

MR. PINKAS: Understood, Your Honor. But also on the point about EBITDA versus EBITDAR, they both project earnings but in different way.

We use EBITDAR in the CVR at the company's request. The company requested that we tie to the existing products that

generate revenue, which by definition excludes VI-0106 because as you've heard testimony on, it has no chance of generating revenue in three years. So if you think about the way the CVR actually works, if you included 106, you would get no revenue benefitting an upswing but you would get, if we tried to develop it, costs, which would bring it down, which means that if I put 106 into CVR I'm actually making it harder for the company to hit the threshold.

But, as Your Honor might surmise, I'm not here to create problems, I'm here to solve them. We have no objection to including 0106 in the products that go in the EBITDAR threshold in the CVR so long as the cost is also included, so --

THE COURT: I'm not negotiating. This isn't a negotiation section. It says what it says.

MR. PINKAS: I'm not making a settlement offer, Your Honor. If Your Honor wants to order it, that's fine. I'm just letting you know there's not some hidden agenda.

As for Mr. Chlavin's offer on VI-0106, the debtors' brief is replete with this. Their business judgment was that the work they would do for net proceeds from a million dollar sale was not worth derailing a 275 million implied value plan.

Your Honor, going to valuation, Mr. Demmy argues that Ms. Stratton's information was stale. She actually testifies in her declaration that she updated the analysis on August 11th

after the end of Q2 results and used those figures as well as she scoured for additional precidential transactions for the other types of analysis' and found none.

She came up with a $231 million midpoint due solely -- the change being due solely to external factors. So from that perspective, there's no mystery as to how she calculated. We have her methodology, we've discussed it at length. There is no stale information here.

Mr. -- Ms. Stratton also testified she used a set of criteria that no one disputed in order to get to a data set that was objective. And that's very critical, Your Honor. Objective. The goal of her analysis was, as she testified, to create a pool of data and analyze them objectively while minimizing discretion in her analysis.

That way, she did not put her thumb on the scale of value, as Mr. Demmy insinuated. And where she did exercise her discretion, she did so to the benefit of the debtors. Your Honor heard that the negative growth rate of Qsymia could have been ten times higher, two and a half up to 30 times. That clearly would have had a huge detrimental impact on valuation because Qsymia is the debtors biggest revenue driver. It accounts for over 65 percent of their revenue per Page 84 of their 10-K.

The FDA has ordered the debtors to perform a CBOT analysis, which they have refused to do for years, that would

cost them between 180 and $220 million and they're trying to get a bye from doing it. But as Mr. King testified, the FDA may very well require it to be performed.

In addition, Ms. Stratton gave the debtors the benefit that they could guard away generics from taking away Qsymia's market share in the next couple of years. On both of these points, Your Honor, another valuation expert could come to a very different result with a much lower valuation.

So, Your Honor, where there is discretion, it actually helps and if we're going to include the contingent value of speculative assets, we also need to include the contingent liabilities that were not in the valuation as Ms. Stratton testified and that's Mr. Morgan's Xonics Photochemical in case, 841 F.2nd 198 at 200. It's a Seventh Circuit decision.

Now Your Honor may say to me what else do I have? What else is there? We heard that -- the testimony from Mr. Pickering that the debtors' financials are achievable but optimistic. They're actually ten percent off for this year alone and as Mr. Demmy said, we're two thirds of the way through the year. So, Ms. Stratton's valuation may actually be high.

Also, Piper Sandler and H.C. Wainwright went to the market to raise capital in what Piper Sandler testified were open capital markets for pharmaceutical companies. Clearly

they did not raise the capital necessary to pay the debt.

So Your Honor says, okay, well, is that a sale? Is that a market test? Yes, it is. A full equity in debt raise is a proxy for a sale of substantially all assets. Why? Because the stock issuance was offering the equity investor 90 percent of the company, i.e., a change of control, and the money was being used to pay down the debt. It was a balance sheet restructuring proposal. So, i.e., there's either no debt or there's less debt. And specific to 106, Ms. Stratton testified that no investor put a value on it. Thirty-nine signed NDAs, not one put a value on it.

Mr. King testified that they couldn't develop it or finance it. So Mr. Demmy asks why did you not do a sale of assets? Well, simple. The debtors determined their plan exceeds the value of any asset sale.

And by definition, based on what they saw in the market, they knew asset sales were going to come in at a lower price. And that decision was not made in a vacuum. Ms. Stratton received offers for assets as part of their strategic alternative efforts. There was not an offer made for 106 and the sum of the bids for assets that were offered was well below 197 million of the financing.

So the financing was actually the best alternative. And it's still a hundred million below the plan.

Finally, Your Honor, Ms. Stratton does a precedent

asset transaction analysis to multiply a multiplier by the debtors' asset value, okay. 3.1 is the median in her analysis. If you apply that, as she did in her precedent transaction analysis, you still come in below the claims. Again, asset sales will not make the debtors solvent. They marketed for months and months and they used their business judgment was there -- that the plan was their best option. That's the market test.

Your Honor, there was also --

THE COURT: What the virtue -- what's the virtue -- excuse me for a second -- what's the virtue of using the median?

MR. PINKAS: I'm glad you asked me that, Your Honor.

The virtue of using a median, Your Honor, is for a pure data set. So, this Court has ruled that the use of a median in valuation at confirmation is appropriate, that's the Nellson Nutraceutical decision I cited, now at Page 31. There's nothing credible in the record to say that's not reasonable or incorrect, but now let's look at how the median works versus the means, because Ms. Stratton said, right, the purpose of the median analysis is to create objective data set with all available data. You're not excluding any outliers. So you're looking at what all the data will tell you and you're coming to an all data objective conclusion.

So let's look to Mr. Manousiouthakis' examples of

Supernus Pharmaceuticals. He says let's change the enterprise valuation by ten times. By definition that will change the outcome because Ms. Stratton's formula is not the enterprise value. It is enterprise value divided by revenue. If you change only the numerator, the multiplier will change. As such, the multiplier for the company would be 25, not two and a half.

So Supernus was actually below the median before and now it's going to jump well above, so in the median range, the median has just gone up and in the mean range, the mean has skyrocketed.

Ms. Stratton testified the use of the median is appropriate as the optimal value in that valuation analysis because it looks at the data objectively. So she crafted an objective analysis with all data. I'm not a valuation expert, Your Honor, but if you look at everything, it seems to me like that's a good practice, and I don't hear a challenge to it.

She also testified that in using the mean, one has to exclude outliers, so now you've introduced discretion, right. Mr. Ahmadi (sic) actually agreed. If you heard him say -- as Your Honor heard him say, if the football coach was a professor at UCLA, you would have had to exclude him from the analysis because he's too high paid.

Again, Your Honor, Ms. Stratton was trying to get a data set that did not skew the analysis in which she did not

have to exercise discretion to the debtors' detriment, which the use of the median solves for. And you can see that --

THE COURT: There are going to be I assume, I mean, Nellson Nutraceutical -- haven't read that one in awhile but it was very specific and as I recall, Judge Sontchi just like did his own evaluation, but -- and came up with his own valuation. And maybe because he didn't buy management's projections, I'm trying to remember, but there are going to be experts who use the mean. I mean, if I look back at the valuation hearing I had last week, they might have used the mean. So it's a call. And I'm not saying it's the wrong call, I don't know that, but if that one call changes the number as dramatically as it does, doesn't that suggest that there could be another valuation? A higher valuation? That to me is somewhat incredible if the change of that one number -- or that one factor, and maybe this is totally the wrong way to look at it, but if that change of that one factor makes a dramatic difference, then even if the rest of the methodology would be the same, which I think it would be, what do I do with that? I do nothing with that?

MR. PINKAS: No, Your Honor. Actually, I agree with you that some other expert could come up with a different valuation and a different valuation methodology. But in your example, what we're talking about I believe is an outlier. So when we look again to the other example that Mr. Manousiouthakis gave us, he said what if I look at HLS

Therapeutics and Knight Therapeutics and I pull them out, right. Well, okay, HLS Therapeutics has an 8.4 times multiple. Three times higher then the weighted median. Okay. So this gets right to your point, Your Honor, that Piper Sandler used. As such, excluding it as an outlier in a mean data set, means the valuation actually goes down because you just took a high number and you took it out of the population of data, right.

Also, if both of those companies were excluded, as Mr. Manousiouthakis argued, the mean actually goes down because HLS has a 8.4 times multiple about three times higher then the median that Piper Sandler but Knight has a 2.2 times multiple, only slightly lower. So if you exclude both, the weighted analysis based on a mean is going to drop considerably, right. So, Your Honor, I think the short answer is, can people disagree, absolutely. We've been disagreeing for four days, right. So people can disagree. And Your Honor may not agree with Ms. Stratton. My only point to you, Your Honor, is it doesn't matter. The debtors are 20 percent or more, I would say more, away from equity value, right, and you have no credible evidence to contravene the valuation analysis that Ms. Stratton has done. By definition, the debtors have met their preponderance of the evidence on valuation.

THE COURT: So let me ask you this question then. Is the fact that they're -- well, assume for the moment -- let's put Dr. Ahmadi on the side, but are you saying that the fact

that there no other valuation in front of me means that there's no -- means that the debtor has met their burden? What are you saying by what you've just said there?

MR. PINKAS: So what I -- it's not a question of whether evidence is one-sided. It's a question of what is the credible evidence by a preponderance. And if you look to Judge Owens' decision the Emerge Energy, that's the analysis she uses. And she says debtors are credible, other side not so credible. Debtors win the day.

There was contravening evidence --

THE COURT: Yes, it was -- she has an interesting sentence in her opinion which I don't have in front of me but when I re-read it I thought how do I juxtapose her sentence which sort of says like I don't have any reason to disbelieve with the burden of proof. It's an interesting -- because I think it's a really well-written, well-reasoned decision and then I get to this one sentence and I thought the burden of proof issue was really important and I didn't understand the one sentence. I wish I had it in front of me because as I said, I think it's a really well done decision. So I'm trying to make sure I understand the arguments on the burden of proof which I'm not sure Judge Owens struggled in her Emerge decision.

MR. PINKAS: Your Honor, I don't recall that sentence from the decision either.

THE COURT: Yes.

MR. PINKAS: I can't either agree or disagree with you but, you know, I will say your last point was it wasn't clear that that was contested. We've had arguments from four different objectors here as to Ms. Stratton's methodology and her conclusions, and I would suggest to Your Honor about 90 percent of the arguments are not located in briefs, they have evolved over time and so every objection feasible that could have been raised to Ms. Stratton's analysis has come out. I don't think there's anything missing. I don't think there's a stone unturned, which I would then say to Your Honor would distinguish us from that last sentence.

THE COURT: Yes. My apologies because I don't -- I've got many opinions on the bench, I don't have that one.

UNIDENTIFIED SPEAKER: Your Honor, can I say something?

THE COURT: Not yet.

MR. PINKAS: Your Honor, can I turn to 106 specifically just to answer a couple of other questions you had?

THE COURT: Yes.

MR. PINKAS: Your Honor, the cost of the 106 analysis and development is -- the testimony is totally congruent. Mr. King said $20 million for a Phase II trial. He didn't say full development.

Ms. Stratton said $40 million for Phases II and III, and another $50 million to commercialize thereafter. Mr. Pickering, I can't remember his number, but he cited a high cost, as well. All three of them totally congruent, and Ms. Stratton and Mr. Pickering have personal knowledge because they both studied 106 to do their respective valuation analyses pursuant to the plan.

Your Honor also asked where is the inflection point? Ms. Stratton actually answered that in her testimony, as well. She said it's after the completion of Phase II trials where you have safety and efficacy data. We don't have Phase II trials or safety and efficacy data. Your Honor --

THE COURT: But I think she also said -- I could be wrong. I think she also said if that was going to happen within her projection period she would value it.

MR. PINKAS: If it was going to happen within her projection period I believe she would have to value it. But you also had testimony that said it was never going to happen within the projection period from Mr. King. And in fact the SEC filings say just that. They say that this is years away. Page 37 of the 10-K. This is years away, and that's before delays. And I'll get to that happily, Your Honor.

On the debtors' lack of funding you asked what evidence is there? The cash collateral budget shows that upon consummation of a plan the debtors don't even have funding to

pay their claims when all of their debt is either reinstated or converted. Clearly they can't pay for their own restructuring, and Mr. Pickering's testimony was the debtors need financing without it.

As to a future lack of funding you heard Mr. Pickering testify that he looked at the exit facility and he analyzed the funding to determine the feasibility of the plan. As part of that he said there's funding for working capital, not the VI-0106. Nothing is being hidden.

Your Honor also asked what is management's view? Okay. Management's view, SEC filings are certified by management. If Your Honor takes judicial notice of the SEC filings, they go into the record, that is management's view, I would submit. And they're cited to in everybody's briefing and in everybody's argument, making it proper to do so.

Now, you don't need to take those views for the truth. They're not hearsay. Right? You can take them for the value of what management believed at the time without implicating hearsay because what Your Honor was trying to understand was management's view. And management's view said in the 10-K, quote, "We may not be able, as in never, be able to effectively develop and profitably launch and commercialize Tacrolimus, or any other potential future development programs which we may undertake, and that may include our inability -- or, excuse me, our ability to conduct Phase II and Phase III

trials, which could be delayed by patient enrollment, long treatment time due to five things, effectiveness, disruption, adverse medical events and side effects, failure to take the placebo, and insufficient data.

Then we look to the projections, Your Honor. You've go the 13 risk factors that have to be met, Page 37 of the 10-K, to generate a single dollar of revenue. And --

THE COURT: Which 10-K are you looking at, Mr. Pinkas?

MR. PINKAS: I'm sorry, Your Honor. I missed that last part.

THE COURT: Which 10-K are you looking at?

MR. PINKAS: It's the 10-K that was filed in March.

THE COURT: March.

MR. PINKAS: It is the 2019 10-K. And it says, and I quote, "The last risk factor, we may never achieve market acceptance by patience, the medical community, and third-party payors and generate product sales." Moving down into that quote, "If we are unable to successfully develop, produce, launch or commercialize Tacrolimus, our ability to generate product sales will be severely limited, which will have a material adverse impact on our business, financial condition, and result of operations."

So sitting here today, Your Honor, what do we have? We have what I would submit are very cautionary statements in a

13-tree decision analysis. We have 106 that's not approved to treat PAH. So the -- you heard a lot about the method of delivery. The method of delivery is irrelevant if the drug can't be used to treat the disease that shareholders are relying on to ascribe value.

But more importantly, Mr. King testified inhalation doesn't work. So what do we have? We have a -- Mr. King called it a dream. I'll call it something a little bit more commonplace. I'll say it's a drug that the debtors have been unable to develop for three years, and they're highly unlikely to ever be able to develop again. They tried to find a partner. They tried to find a lender. They failed. They made clear that 106 is years away, and they would have to develop, launch, and commercialize it. Thirteen reasons why they could not do that, all on the 10-K, so I won't read it back to Your Honor.

The law treats speculative and contingent assets as having zero value, and that's important not because the assets are hard to value. It's because they are so contingent that they have no present value. That's the Spansion and Ampex decisions. Ms. Stratton's testimony was just that. 106 is so speculative and contingent that it has no present value. And if you look at it on an asset basis no more than one million. There is no evidence that says that calculation is incredible. But it doesn't matter because we don't have to look to Ms.

Stratton. If you look to Your Honor's contingent risk analysis I'd say 15 percent is generous as to 106 getting through the 13 traps to be commercialized and generate revenue. Multiply that by 40 million, that's $6 million. No matter how you look at it the debtors are insolvent.

Mr. Demmy argued we should look at 2021 revenue in evaluation. That's apples and orange, Your Honor. Ms. Stratton says you have to value when you do the analysis as of revenue in that year, clearly.

But more importantly, Mr. Demmy himself recognized 1129 valuation is done as of the effective date. That's -- the effective date is not in 2021, Your Honor. It's around Labor Day if Your Honor confirms the plan. That makes sense because as Your Honor heard there's a lot that would have to change to get to 2021, including not on the asset side but also on the claim side of the debtor's balance sheet.

We went through median and mean, Your Honor, so I won't do that again. Discount rate and working average cost -- excuse me, weighted average cost of capital, Mr. Demmy argues you look to the exit facility. Okay. Ms. Stratton says he's wrong, but okay. Even if we look at the exit facility the interest rate is 11 percent. The commitment fee is two-and-a-half. That's 13-and-a-half percent cost of capital. Ms. Stratton testified not only is it improper to use that, but in any event she said 13 percent is correct. Okay. The exit

facility is spot on. So the exit facility provides no basis to address the cost of capital.

Mr. Ahmadi testified, which Mr. Demmy then incorporated in his argument, that the discount rate should be ten percent. I would argue to Your Honor that that simply can't be the case. The debtor's current cost of secured debt, the secured notes, which were not issued to us, as you know, exceeds that number. Their cost of debt in the secured notes' indenture, their only secured debt, is 14 percent. That's the definition of interest rate in Section 2.3(d), and that indenture is available at the June 8th, 2018 8-K. And of course, Your Honor, that 14 percent is before I impute the time value of money, so the discount rate is necessarily higher.

Your Honor, just a couple very quick points on the June 20 presentation. I gave you the law. The presentation was for a very different purpose than what we're doing today. I am not suggesting that Your Honor can't look at it. I'm not suggesting that it doesn't exist. All I'm saying is, number one, it was for a very different purpose, number two, the law says it's immaterial and to be given no to little weight per the cases I cited.

Your Honor, let's now talk about the practical as I try to round this out. The shareholders make multiple restructuring proposal, none of which account for the debtors' reality. The shareholders asked the Court for a long-term

forbearance, or that certain assets be hived off for their benefit. None of that comports with the absolute priority rule. None of that is feasible.

The debtors don't have a liquidity issue. Their debt is matured. They need a balance sheet restructuring. It's a very, very different scenario than what the shareholders proposals hypothesized. And as the debtors testified and their independent auditor found, which going concern qualification is again in that March 10-K, the independent auditor found that debtors cannot continue as a going concern without a balance sheet restructuring.

So I want to correct the record on one point, Your Honor. One of the shareholders argued that IEH tried to help the debtors for 30 days. No, Your Honor. In November 2019, eight months before the petition date, we went to the debtors and we said we have heard in your earnings call that you said it would be crazy to refinance the convertible notes at this time because, number one, they're not callable, and number two, since they're not callable you would have to carry two pieces of debt until the maturity date, and therefore pay double interest. We said to the debtors we will consent to letting you call, and we will eliminate your double interest. We will give you that consent any time you have the money. So we eliminated any roadblock to them doing the refinancing, which is critical, because here was have shareholders saying the

debtors didn't do enough for eight months. Under the terms of their debt documents they could actually do nothing for eight months. The only option they had was to give us $170 million on May 1st. They couldn't call us, they couldn't redeem us, they couldn't convert us, so we actually gave them the option to do this refinancing, none of which we were required to do. So clearly, Your Honor, we were trying to help these debtors much farther ahead of time, and all of this is in the public SEC filings, the convertible indenture is a public document.

Finally, Your Honor, absent confirmation the debtors are back to the drawing board and the claims amounts only grow. All of that would result in a worse outcome for the company and shareholders.

Lastly, Your Honor, I want to just touch on the releases, and this supposed behavior that has been attributed to IEH as being unfair. On the releases we are the only creditor not being paid in full. We are agreeing to roll our secured debt into the exit facility. We are agreeing to convert 170 million of unsecured debt claims at what the debtors say is a 76 percent recovery.

What are doing in exchange? We are giving people $45 million. Unsecured creditors are getting payment in full to which they otherwise wouldn't be entitled. That's $5 million out of 76 percent recovery. And shareholder recovery is $5 million on the effective date and up to $35 million in a CVR.

So, Your Honor, we go back to the very simple premise upon which shareholder arguments start. The debtors and IEH do not, quote, eagerly desire releases because of a hidden agenda, as Mr. Dijkstra implied. They have a plain purpose, and it makes perfect sense. Releases are integral to this plan because the valuation implied in the plan of $275 million plus the CVR is in excess of the debtor's value. And that was done to minimize the disruption in the debtor's business and to close this chapter.

I think it's self-evident for Your Honor, but I'll say it, absent the releases we would not support a plan above the debtors' valuation because we would be asked to pay people up front and hope that they would not make a claim that would disrupt the business that we have to be repaid out of. Nobody in their right mind would do that, much less a lender.

Looking to the case law in this district, Your Honor, Pages 8 to 12 of our reply cite 12 cases that have approved releases either identical to or very similar to this one. Also, Your Honor, you'll hear the argument again from Mr. Morgan, but 1141 puts all parties in interest to the onus to object to a plan because it is a super contract binding them. As such, for the cases we cited in the reply the opt out structure is appropriate.

More importantly, Your Honor, the opt out structure worked. 106 shareholders chose it, and over 10,000

shareholders said I would prefer to get the settlement and did not object. So I would submit to Your Honor there is actually overwhelming settlement that this plan be confirmed.

I will touch on the existing stock settlement very simply, Your Honor. It's either a conditional gift or it's a settlement. Either one is appropriate and valid.

As to our behavior, Your Honor, and I'll round out here and finish, the debtor's restructuring is not the result of a zealous note holder. It was borne of necessity. The debtors had a maturity that was public since 2013. They have not had cash since 2013 to pay their debt. IEH waited five years to be repaid. We tried to eliminate roadblocks, as I said, for eight months. We permitted other noteholders to be paid so that we could give the debtors forbearance for an additional 60 days so that they could again try to refinance twice, all while we negotiated in the background the balance sheet restructuring as a contingency that the debtors asked us for.

We're the only party entitled to a distribution that is impaired, and we're proposing to give shareholders a recovery despite that impairment.

Finally, Your Honor, we spent over $60 million of our money to buy the secured note claims to enable a prepackaged restructuring to minimize the impact on the debtor's business so that we could then support a plan in excess of the debtors'

value.

Your Honor, I have not seen this in other cases, so I am not going to tell you that this is mainstream or common, but I would say to Your Honor IEH's actions are not only laudable compared to many fact patterns that Your Honor sees, but they are the only reason creditors will be paid in full and shareholders will get any recovery.

Finally, Your Honor, last point, the debtors conducted an independent investigation to support the debtor release in the plan. That investigation, as you see in Ms. Frizzley's declaration, included Ethereum and IEH, Ethereum being the prior secured noteholder. The investigation, per Ms. Frizzley, found no colorable causes of action, and her testimony is uncontroverted.

So, Your Honor, there's nothing being hidden here. We are trying to do the right thing. We are trying to give the shareholders value that they're not entitled to. We're trying to give creditors an additional $5 million they're not entitled to. And we're just trying to move on so that in hopes when we own this business we could actually hope to get repaid from it. It's that simple. I don't want to say there's a hidden agenda. There certainly isn't one. It's all as plain as the tip on my nose. And I would say, Your Honor, with that confirmation should be approved. Thank you.

THE COURT: Thank you. I'm not suggesting there's a

hidden agenda, but I assume that IEH has taken actions that it believes are in its best interests to take, as I would expect them to do. Okay.

MR. MANOUSIOUTHAKIS: Your Honor, sorry about that. Can I speak?

THE COURT: You can have five minutes.

MR. MANOUSIOUTHAKIS: Okay. Thank you. Just in order to clarify the issue about the median, because things stand exactly the way I said they stand. Whatever the IEH counsel said about the median does not affect anything that I said. The median concept, once you apply it to one of the columns, pick any column you want, you rank the entries of the column. It's only the two -- the two entries in the middle that matter. For example, if we want to talk about (indiscernible) to revenue as we start and discussed, what is the smallest number that I see in that column? .9X. That will be at the bottom of the column. It will be irrelevant. What's the highest number? 7.3X. It will be at the top of the column. It will be irrelevant. Its only relevance is is it above the two middle entries? The concept is identical. I just -- you know, create confusion just to create confusion. This is what we are observing. That's item number one.

The number two items means the IEH counsel talks about how the VI-0106 may take years to develop and so on. It says all (indiscernible) designation. The minute that it

completes the Level II it will have fast tracking. It does not have only fast track designation in the U.S. It also has it in the E.U. It's a whole different market. How many people have been approached in the E.U. to license it at Phase I? (indiscernible) managed to license for 90 million its Phase I drug. So that's one issue there.

And then the issue about the Ethereum payment, one could attribute some possible fraud to the IEH that if Ethereum debt holders are still in play, then they may have to be an integral part of the negotiations between the debtors and the creditors. And they may not be agreeable to we will becoming a subsidiary of IEH. Could that be a possible rational that may enter into these considerations? I don't know.

So these are the three points I wanted to make. Thank you.

THE COURT: Thank you.

MR. DEMMY: Your Honor?

THE COURT: Mr. Demmy?

MR. DEMMY: Yes. I just want two minutes, both on evidentiary issues. First, we did not cite SEC documents in our papers. We didn't rely upon them. The record is closed. The debtors had an opportunity to offer SEC exhibits. I object to the Court taking judicial notice of SEC filings.

Two -- point two, we just went through about an hour-and-a-half, as I counted it, of the sixth witness for the

debtor, Mr. Pinkas. He made some argument, but he did a lot of testifying, Your Honor, and I'm sure you understand that, and I'm sure you can decipher amongst his statements which was testimony about what IEH Biopharma did or didn't do, or what it thought, or what the debtors did or didn't do and thought. I just wanted to note those two for the record. So I did not want to interrupt Mr. Pinkas while he was testifying as the sixth witness for the debtor after the record is closed, but it's there, and I couldn't let the record close without me making that observation. Thank you, Your Honor.

THE COURT: Thank you. Mr. Morgan?

MR. MORGAN: Thank you, Your Honor. So, Your Honor, as I was listening to Mr. Pinkas I was steadily crossing my arguments off. At this point I think I would put it back to you given the hour and given the length of the arguments, the testimony, the record in front of you, the papers, everything you have in front of you, I think you have what you need to find the debtors have met their burden by a preponderance of the evidence.

That said, I am happy to address any questions you have. I'm happy -- I love the spotlight, so -- I hate to give it up, but I think you have what you need, Your Honor.

THE COURT: Okay. Thank you. I do not have any additional questions for anyone. And if there's anything that you think has not been covered I will hear that. But otherwise

I think the way this turned out with Mr. Pinkas speaking last, as you pointed out, you were crossing things off your list, I think he summarized, whether through argument or perhaps through testimony, as Mr. Demmy would say, the debtors' position, and those in support. So I have no remaining questions.

MR. MORGAN: I think, Your Honor, the one other -- thinking back to the U.S. Trustee's concern --

THE COURT: Yes.

MR. MORGAN: -- Mr. Pinkas had mentioned that he would be happy to re-notice. I actually caution against that. We have many thousands of shareholders. I don't think it's appropriate to re-notice all of the shareholders. I think, and submit, and we've argued that it was clear as written. These people -- these shareholders received the notice. There's no shareholders that didn't receive the notice. And almost by definition those -- by definition those that responded to the opt out form received the forms that Ms. Casey pointed out were so clear and so carefully worded. So they already had the disclosure. They already had the material. Sending more material I don't think is going to make it better. And in terms of Ms. Casey, you know, sort of hitting on we have testimony of confusion, we have testimony of confusion, that's not what we have testimony of. We have testimony that a few people reached out to (indiscernible). Also, if you look at

the opt out form there's an e-mail and a phone that suggests that they reach out, if they have any questions. The reason we put that in every opt out notice is that people have questions sometimes they'd want to ask and understand. There's no testimony that there's some great -- you know, great massive confusion.

So I think the rest of the arguments go to what we've already addressed in our papers, and I don't know that we need to get into arguing the finer points of the relief, but I did want to address that because it had to do with the communications.

Also, the -- my third -- my third also, that e-mail that went out, you know, two things to note about it. One, if you didn't respond nothing happened. Two -- but it starts off by saying you have opted out. You have opted out. There -- this is -- if you did not respond, you could do nothing, you'd stay opted out. The revocation was trying to confirm that people wanted to make sure that they were doing what they thought they were doing, and then if they were we needed information. But information is the key. That's what we were trying to ask for.

THE COURT: I think I'll address that. If I confirm the plan we'll come back and have a discussion about what needs to happen with respect to either the entire shareholder constituency, or those who had some subsequent communications

with Stretto. So I'll address that and may have some further questions with respect to that because it is a little bit unusual situation, or at least I haven't encountered this specific type of situation before, so I would need to give some thought as to what I think would be appropriate in this circumstance. I hear Mr. Pinkas being flexible is what I hear on that issue. But we'll have that discussion, if need be, once I rule.

MR. MORGAN: Understood, Your Honor.

THE COURT: So I want to thank everybody for their arguments, and quite frankly for the way the entire hearing has been handled. I know it's very difficult for those who are unrepresented. I think you acquitted yourselves well under the circumstances. And I will take this matter under advisement.

My goal had been to rule promptly. I am not going to write. It's going to be from the bench. But I will tell you when it won't be. It won't be tomorrow because I have a full day trial tomorrow on something else. It won't be probably the next day. And I got a new case, so I have first days. So I will get to this as soon as I can, and my goal is to consider what has been said carefully, and to rule as promptly as I can. And my chambers will reach out to parties to let them know when that is going to happen. And given that I probably have more control over when that can happen then I have in terms of scheduling this, I'll try to make it at a time that is more

palatable for everybody on the call, no matter where you're located.

So that will be the goal, given that the ruling will be -- while it could be lengthy, it's something I control more than the -- than how a hearing needs to proceed. So thank you again. My chambers, as I said, will reach out and let you know, and I will get to this as soon as I can. I want to give the consideration that it clearly deserves. So thank you --

UNIDENTIFIED ATTORNEY: Thank you, Your Honor, for your time.

THE COURT: -- and we're adjourned.

UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

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C E R T I F I C A T I O N

We, DIPTI PATEL, KAREN WATSON, BETH GRIGSBY, KAREN HARTMANN, CINDY POST and TAMMY DeRISI, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter to the best of our abilities.

/s/ Dipti Patel
DIPTI PATEL

/s/ Karen Watson
KAREN WATSON

/s/ Beth Grigsby
BETH GRIGSBY

/s/ Karen Hartmann
KAREN HARTMANN

/s/ Cindy Post
CINDY POST
RELIABLE

/s/ Tammy DeRisi
TAMMY DERISI

Date: September 2, 2020